They come under the purview of the Public Service Commission and their tenure is the same as that of any departmental employee. Finally, all departmental corporations must submit an annual report, which must be tabled, by the minister responsible, in the House of Commons. This report is essentially to provide publicity for the activities of the organization and to ensure that such independent bodies are not above considerations of economy and efficiency.

Semi-Independent Agencies of the Public Service

There are a great many commissions, agencies, councils, boards, and tribunals that have functions that might make them appropriate candidates for departmental corporation status, but which for various reasons have been kept within the public service proper. These bodies include regulatory, investigative, quasi-judicial, and even service-delivery institutions and are kept under closer control of the Cabinet because, in most cases, they have responsibilities that can be extremely significant in terms of public policy. They are listed in a separate schedule of the FAA and number more than fifty individual organizations. While there is no need to provide the entire list here, by mentioning a few of them, the reader will get a sense of the sorts of responsibilities these bodies have.

The **operational** or "service-provision" category includes the RCMP, the Canadian Security Intelligence Service (CSIS), Statistics Canada, the Public Service Commission, Elections Canada, and the National Archives. All of these government agencies are fairly large organizations, but because of the need for objectivity and non-partisanship in the performance of their duties, they report to a minister less directly than a line department does.

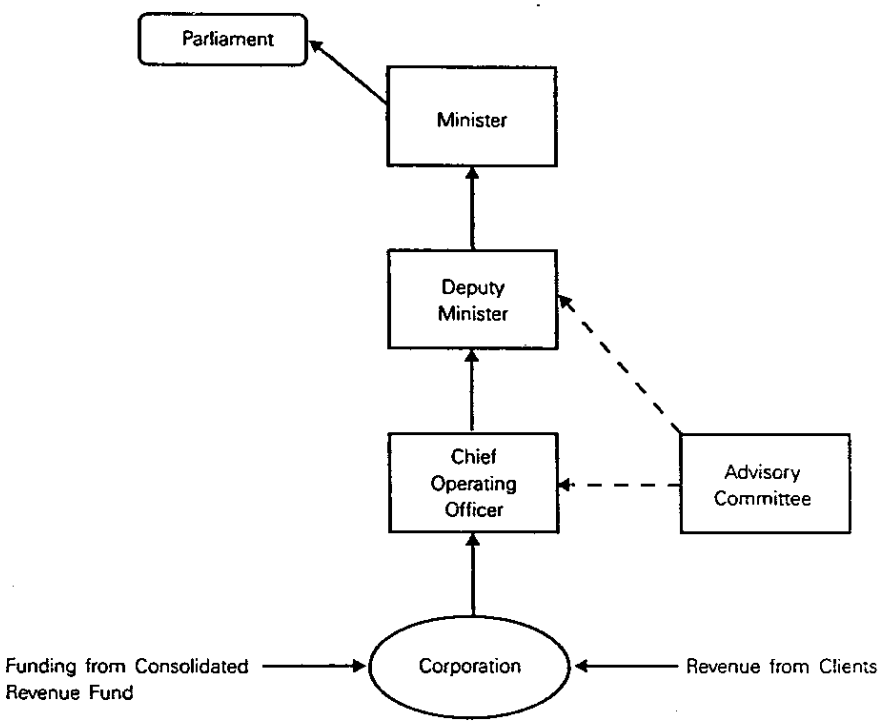
In the **quasi-judicial** or **investigative** category, agencies such as the Civil Aviation Tribunal, the Immigration and Refugee Board, the National Parole Board, the Public Service Staff Relations Board, and the Security Intelligence Review Board (SIRC) all have to be at arm's length from politics of the day in order to retain a modicum of impartiality. At the same time, because of the sensitivity of their decisions, the government has been reluctant to place them completely outside the purview of the Cabinet.

Finally, this *pot pourri* of organizational orphans also includes important **regulatory agencies** such as the CRTC, the National Energy Board, and the National Transportation Agency. While these agencies must operate in a semi-independent manner to keep raw partisan bias from sullying their deliberations, at the same time, their decisions are policy decisions of the government. Hence, the government of the day naturally wants to have them either close at hand or at a "short arm's length."

Special Operating Agencies

Organizationally, the "newest kid on the block" in the federal public service is the **special operating agency** (SOA). One of the recommendations of *Public Service 2000*, which we will discuss in the next chapter, was to "achieve a new balance between the philosophy of control and risk avoidance and the desire

Figure 22.5
Special operating agency.



to encourage innovation and promote initiative."[4] The SOA is an institutional arrangement designed to accomplish that new balance.

The SOAs are set up through a framework agreement that defines an arm's-length relationship between a sponsoring department and a unit within the department. The special operating agency is given much greater autonomy within the department and, as well, is exempt from many of the government-wide administrative rules. Generally, the units that can be converted to SOAs are already self-contained within the department, they have a clear mandate or mission, and they have roles associated with the delivery of a specific service.

The first five SOAs started up in 1990 and four of these provide services to other departments and agencies in the government on a cost-recovery basis. The exception, the Passport Office, delivers its service directly to the public. While they don't actually "bill" their public-service clients, the SOAs are funded through a **revolving fund.** A revolving fund is a non-lapsing appropriation out of which the SOA pays its bills and into which it deposits its "revenues," in the form of paper transfers from the client departments. This allows the agency to

4. Service-to-the-Public Task Force. *Report* (Ottawa: SSC, 1990) p. 16.

operate on a commercial basis and not to have to jump all of the accountability hoops set up by Treasury Board.

While they are "special," SOAs are still part of the department and are ultimately accountable to the DM through the framework agreement that sets them up. The employees of SOAs are public servants with all of the benefits and constraints associated with that status, and the organization is subject to review by the auditor general. The SOAs must prepare annual business plans as do all departments and they are expected to operate efficiently. At time of writing, about a dozen more SOAs have been approved and several are pending. None of this next wave of SOAs has an exclusive service-to-government function and in fact many of them deal only with a public clientele.

Crown Corporations

A **crown corporation** is a government institution with a corporate form, created by act of Parliament to perform a public function. In 1995, the *Financial Administration Act* defines a crown corporation as a "parent Crown corporation or a wholly owned subsidiary." Historically, however, crown corporations were a much more inclusive category, including **departmental corporations**, described above; **agency corporations**, which carried on commercial activities with the public but which did not compete with private-sector corporations; and **proprietary corporations**, which were essentially private companies wholly owned by the government. The latter two categories of crown corporations are now all **parent crown corporations** and the distinction between agency corporations and proprietary corporations is no longer relevant.

Parent Crown Corporations A parent crown corporation is headed up by an independent board of directors, which is appointed for a set term by order-in-council. The members of the board usually include a full-time chairman or president, who may also function as the administrative head and chief executive of the corporation, and part-time members, who meet as a board only a few times each year. In the case of some crown corporations, members of the board may include public servants from other governmental agencies, but the trend is definitely away from this practice. The relationship of the chief executive of the corporation to the board will differ, depending on the nature of the corporation and the personalities involved. However, in some parent crown corporations the president is appointed by the government and in others is elected by the board itself.

The activities of parent crown corporations are not supervised directly by a Cabinet minister. Indeed, independence from direct political control is one of the major reasons for creating a crown corporation. Despite this, and mainly because it is felt that public enterprise financed by public money should be subjected to at least some parliamentary control, each crown corporation is assigned to a minister of the Crown, *through* which it must report to Parliament. The minister, however, does not in any way direct the activities of the corporation and is in no way personally responsible for the activities of the corporation.

A minister is assigned to act as a communication link, as necessary, between Parliament and the corporation, which is engaged in public enterprise and which, in many cases, is spending public money. The bulk of a minister's work on behalf of a crown corporation will entail justifying the corporation's funding to the House of Commons. Naturally, it may be possible for a minister to influence corporation policy informally, but this is difficult to document. All that can be said is that informal ministerial control over a crown corporation will depend largely on the personalities involved, on the extent to which the corporation requires government funds to stay in business, and on the policy implications of the corporation's activities.

Part-I and Part-II Parent Crown Corporations Parent crown corporations are all listed in Parts I and II of Schedule III of the *Financial Administration Act*. Part-I corporations are generally responsible for "the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction, or disposal activities on behalf of Her Majesty in right of Canada." These corporations deal directly with the public and with private corporations in the sense that they charge fees, tender contracts, or buy and sell assets and commodities in the open market. These corporations may act as the crown *parent* or holding company for any number of subsidiary corporations, but they are generally deemed to be in sufficiently sensitive or policy-relevant areas of enterprise to justify the government presence in the open marketplace. As well, Part-I corporations are generally expected to require at least some contribution from the Consolidated Revenue Fund in order to be able to survive. Part-I corporations are listed below.

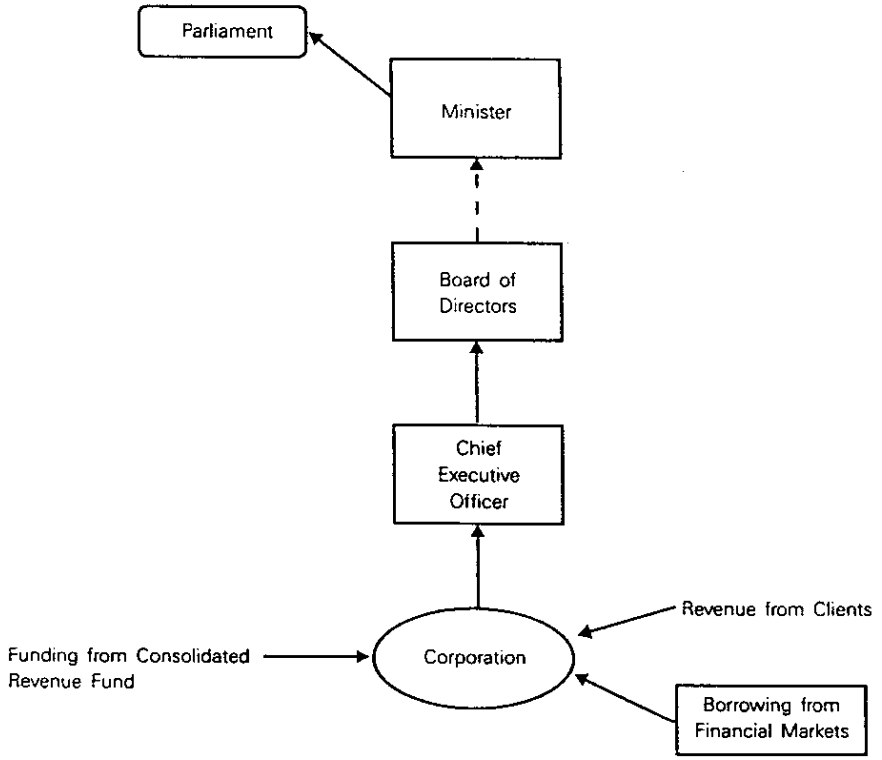
Atlantic Pilotage Authority
Atomic Energy of Canada Limited
Canada Deposit Insurance Corporation
Canada Lands Company Limited
Canada Mortgage and Housing Corporation
Canadian Commercial Corporation
Canadian Dairy Commission
Canadian Museum of Civilization
Canadian Museum of Nature
Canadian Saltfish Corporation
Cape Breton Development Corporation
Defence Construction (1951) Limited
Enterprise Cape Breton Corporation
Export Development Corporation
Farm Credit Corporation
Federal Business Development Bank
Freshwater Fish Marketing Corporation
Great Lakes Pilotage Authority, Ltd.
Laurentian Pilotage Authority
Marine Atlantic Inc.
National Capital Commission
National Gallery of Canada

National Museum of Science and Technology
Pacific Pilotage Authority
The St. Lawrence Seaway Authority
Standards Council of Canada
VIA Rail Canada Inc.

Part-I parent corporations that have the word "Limited" or "Ltd." after their names were set up under the *Companies Act*; the rest were set up by separate legislation. The boards of directors of the limited corporations are named by the shareholders, but because the shares are held in trust for the Crown, the governor-general-in-council formally makes the actual appointments. Most of the other corporations are headed by a board of directors, which is appointed for a set term by the governor-general-in-council.

The employees of the Part I corporations are all appointed by the management of the corporation itself, and the salaries and conditions of work are also determined in a manner similar to private industry. While there are exceptions, generally these corporations are empowered to maintain accounts

Figure 22.6
Appropriation-dependent crown corporation (Part-I parent crown corporation).



in their own names in any bank that is formally approved by the minister of Finance. The operating budget of the corporation is scrutinized by the minister through which the corporation reports to Parliament, but the actual estimates for operating costs are placed before Parliament in the form of one item in departmental estimates.

Capital budgets of Part-I parent corporations are subject to more detailed scrutiny by Parliament, and, as with departmental corporations, an annual report, including financial statements, must be presented to the minister responsible at the end of the fiscal year. These reports are then tabled in Parliament. All the financial statements of Part-I parent crown corporations are subject to the scrutiny of the auditor general.

The legal position of such corporations is much the same as that of any private corporation created under the *Corporations Act*. Most Part-I corporations can be sued in any court just as if they were not agents of the Crown. This is important in that it places them in much the same legal position vis-à-vis their clientele as any firm operating in the private sphere. By making them legally directly responsible for their activities, the government can also afford to grant them a great deal of independence from financial and political control.

The second category of parent crown corporation, listed in Part II of Schedule III, must operate in a competitive environment, must not normally be dependent upon appropriations for operating capital, must ordinarily earn a return on equity, and must have the potential of paying dividends. In effect, what distinguishes Part-II corporations from Part-I corporations is that the former are **"privatizable"** in terms of both their policy significance and their attractiveness to would-be private-sector buyers or shareholders. Past denizens of this schedule of the FAA include Air Canada, Eldorado Nuclear, Northern Transportation Company, Polymer Corporation, Teleglobe Canada, and PetroCanada. The current fairly short list includes eight port authorities, Canada Post, CNR, the Canada Development Investment Corporation (CDIC), and the Mint.

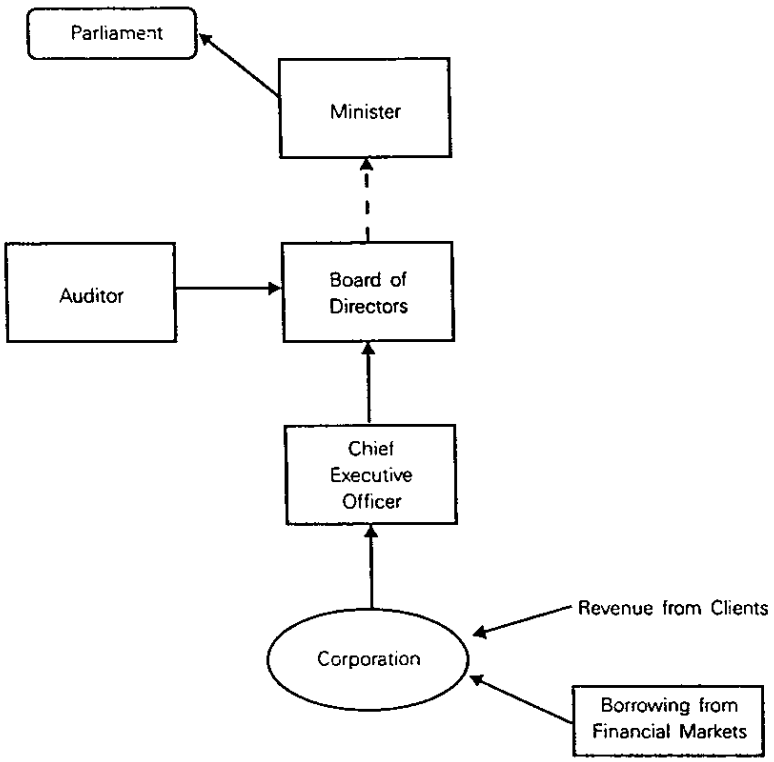
Other Crown Agencies

There are many corporations wholly owned and operated by the government of Canada that are not listed in Schedules II and III of the *Financial Administration Act*. While these are not classed as departmental corporations or parent crown corporations, they perform mostly the same kinds of functions as those corporations listed in the FAA, and therefore should be considered briefly at this point.

Most of these unclassified crown corporations are set up by separate federal legislation to perform functions that require a degree of independence of action but, often for unstated reasons, they have been excluded in the schedules of the *Financial Administration Act*. The most notable examples of this sort of bureaucratic agency are the Bank of Canada and the Canadian Wheat Board, each of which has been set up by its own special legislation. Recent additions to this list include the CBC, which was originally classified as a proprietary crown corporation, and the Canada Council.

These unclassified corporations, because they display many varieties of internal organization and procedures for control, do not lend themselves to

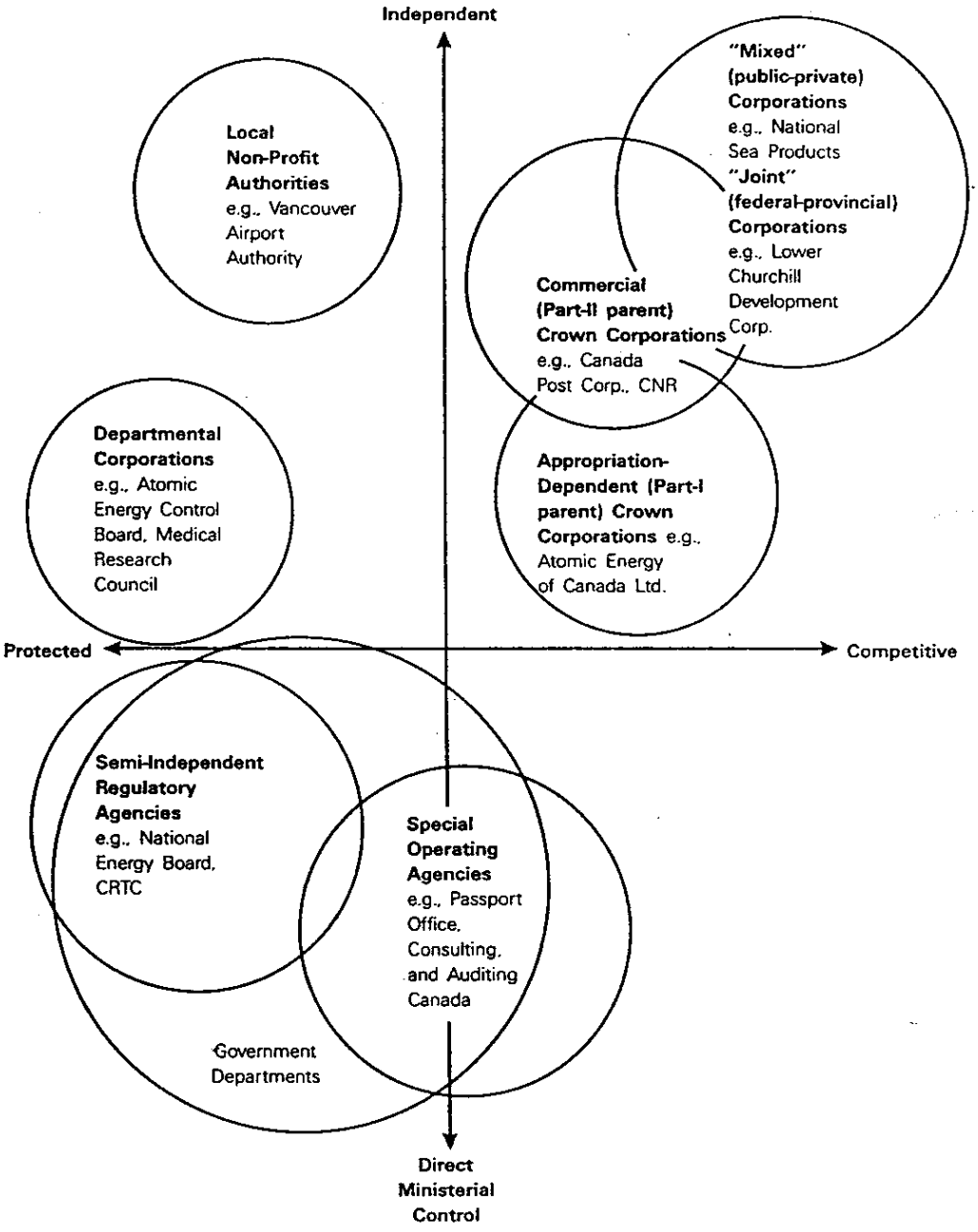
Figure 22.7
Commercial crown corporation (Part-II parent crown corporation).



description here. It should also be mentioned, at this point, that there are many government corporations at the provincial level that function in approximately the same way their federal counterparts do. Because of their organizational diversity and great numbers, we can do no more in this study than mention the fact of their existence.

There are a number of government corporations and commissions in existence that are unique not because of their line functions but because their structure, composition, and legislative mandates are *intergovernmental.* Examples of these are federal-provincial agencies such as the interprovincial and territorial boundary commissions, which are set up as required. Each consists of a commissioner from the provinces concerned and the surveyor-general of Canada as the federal representative. Another example of joint federal-provincial enterprise is Syncrude, in which federal and provincial governments as well as the private sector were joint participants in an oil-sands development.

Figure 22.8
Organizational forms in the Government of Canada: summary chart.



Miscellaneous Government Structures

In the international sphere, there are also joint Canadian-United States corporations and commissions. Some of these, such as the International Joint Commission and the International Boundary Commission, have been in existence for a long time and are concerned more with the settlement of international disputes than with the management of some genuinely joint enterprise. However, a more current trend is for such joint bodies to have operational responsibilities for managing or developing a shared resource. Perhaps the earliest such body was the Columbia River Permanent Engineering Board, which was set up in 1964. Other examples include the Roosevelt Campobello International Park Commission, where a Canada–United States board jointly administers an international park.

While such bodies are still the exception, it seems likely, particularly in the areas of conservation and recreation, that there will be greater need for them in the future, both in the federal-provincial and in the international context. Perhaps one of the more interesting of these mixed-jurisdiction bodies is the Porcupine Caribou Management Board, which has the responsibility for dealing with all aspects of the conservation and management of a resource that has no respect for political boundaries in its wanderings. While it does not give the caribou a seat, the board has representatives from the governments of Canada and the United States, Alaska, the Yukon, and the Northwest Territories, and from aboriginal First Nations of Alaska, the Yukon, and the Northwest Territories. Most interestingly of all, it seems to be able to come to decisions!

A prominent phenomenon of the late 1960s and the 1970s was the *mixed public-private enterprise*, and by 1980 the federal government was the majority shareholder in about fifteen such corporations. Because these mixed-enterprise corporations have a major responsibility to their private-sector partners and shareholders, a major corporate goal is to make money. However, because these are at least partly "public enterprises," there are policy-related goals as well, which likely complicate and qualify the single-minded search for profits. However, the privatization drive of the Mulroney years ended most of these enterprises and, with the exception of some of the holdings of the Canada Development Investment Corporation (CDIC), this type of government activity is essentially moribund today.

This concludes our analysis of the various institutional forms found within the Canadian bureaucracy. We now turn to a discussion of the bureaucratic process and attempt to explain how the various bureaucratic institutions actually fit into the governmental process.

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Intergovernmental Relations

The relationship between the Federal Government and the Land Governments represents an important feature of the political scene in the Federal Republic of Germany. Moreover, it is a relationship which forms a firm component of this country's federal system and which has attracted a great deal of admiration abroad. It has furnished an impetus for many a federal movement and national concept both in Europe and elsewhere. In addition, federalism has demonstrated its merits as one of the fundamental principles underlying European integration. Its proponents point to its contribution towards the economic advancement of the Federal Republic of Germany and towards her political flexibility and stability. Needless to say, the picture is somewhat more varied in domestic politics where the views on the efficiency of the federal system range from critical scepticism to militant defence – depending on the field of activities concerned. Broadly speaking, however, the federal system enjoys a positive image in today's public opinion.

An intricate nexus of relations has developed between the Federal Government and the Länder. These operate at various levels and embrace various functions and areas of state activities. This paper deals above all with the main politico-administrative relations between the Federal and Land Governments. In order to arrive at a more precise assessment of the latter, it is perhaps advisable to focus our attention on certain characteristics of our federal system.

After taking a look at these features, we shall turn our attention to certain forms of intergovernmental relations which have evolved since 1949. Then, we shall consider the budgetary and financial reforms of 1967/70, which formed part of the changes in the federal State as such and also created the constitutional basis for a typical form of intergovernmental cooperation, i.e. cooperative federalism. We shall then conclude with some observations on the impact of the reforms.

Characteristics of the Federative System in the Federal Republic of Germany

The manner in which legislative and administrative powers are shared between the Federal Government and the Länder varies considerably. Hitherto, the former has made extensive use of its legislative powers and also contrived to increase its legislative jurisdiction by numerous amendments to the Constitution. The important areas of public affairs which the Länder have managed to reserve for themselves include, for example, cultural matters and school education, broadcasting and the 'new media' (other than transmission techniques), police law, local government law and certain spheres of the social services.

On the other hand, the Executive's responsibilities – including the implemen-

tation of federal laws – largely rest in the hands of the Länder and the local authorities. In fact, the Länder fundamentally implement federal laws as their own activities. Federal administration is confined to specific sectors and institutions such as the Foreign Service, the Federal Armed Forces Administration, the Federal Finance Administration, the national railways and postal service, the Federal Criminal Investigation Agency and the Central Bank. In some cases, the administrative structure has evolved historically. Although the Federal Government has made full use of its right to set up independent federal authorities as well as directly operated entities and public-law corporations within the framework of its legislative competence, these do not possess great importance in comparison with Land and local-authority administrative bodies. The same holds true of the Länder administration on behalf of the Federation. This grants the Federal Government the right to issue instructions, but the establishment of public authorities basically remains a matter for the Länder to decide. In fact, the Federal Government attempts to exercise its influence on the implementation of federal laws via general administrative and procedural provisions. Nevertheless, the Länder are now resisting this practice more and more via the Federal Council.

This pattern of functions produces the problem of a varying distribution of functions between the Federal Government and the Länder with the former enjoying a certain choice due to its far-ranging legislative jurisdiction. By the same token, however, the Länder have gathered the administrative experience without which effective legislation is not possible.

One difficult problem under a federal system comprising Länder with varying financial resources consists in the apportionment of costs and receipts. In principle, the Federal Government and the Länder defray their expenditure themselves. Individual taxes are apportioned among the Federal Government, the Länder and the local authorities. However, the enactment of tax laws and hence also the right to exploit a source of taxation largely rest with the Federal Government. The most important area of income is those taxes shared jointly by the Federal Government and the Länder (and, in the case of certain special types of taxes, by the local authorities as well), i.e. income, corporation and turnover taxes. These account for over 70% of the total taxes accruing to the Federal Government and the Länder. In each given situation, a fresh decision must be taken on the share of turnover tax falling to the Federal Government and to the Länder whenever the ratio between their income and expenditure changes substantially. As a rule, the percentages are re-assessed every two years. The criteria governing the allocation of tax revenue among the Länder are the local volume of tax yield and the number of inhabitants.

In addition to the general apportionment formulae, reference must also be made to special instruments for financial allocations from the Federal Government, financial participation in 'joint tasks', the provision of financial assistance for investments and the bearing of costs under laws involving payments. To this must be added fiscal adjustment between one Land and another. These instruments are intended to effect a fine adjustment between the special burdens or the differing economic and financial resources of the Länder and local authorities. In 1980, the volume of the Federal Government's tax yield passed on to the Länder in the form of allocations amounted to 11.7%.

This constitutional framework of the federal system indicates the existence of various patterns of decision-making which partly complement and partly correct each other. On the one hand, the Constitution pursues a strategy which separates the decision-making competence of the Federal Government from that of the Länder (and above all the responsibility for the defined functions and disbursements) whilst, on the other, it forces the Government and the Länder to engage in a process of reciprocal consultation, coordination and cooperation.

In addition, special forms of cooperation exist under the Constitution and in governmental practice. These have evolved historically and they are therefore best described in their chronological context. First of all, however, we must take a look at the supreme constitutional organ linking the Federal Government and the Länder i.e. the Federal Council.

This is composed of representatives of the Land Governments. Nevertheless, it is not a 'Länder Chamber' in which the Länder on the one side face the Federal Government on the other. It is in fact one of the supreme constitutional organs in the Federal Republic of Germany. Hence, it appears logical for the Constitution to speak of the Länder taking part in national legislation and administration through the instrumentality of the Federal Council. The Länder are linked to the organizing of central government via the Federal Council. This ambivalent position on the part of the Länder substantially determines the Council's role: the Länder must assert their own interests, but at the same time they are obliged to uphold the State's overall interests. The Federal Council furnishes the Länder with an opportunity to bring influence to bear on the central government's decisions with varying degrees of intensity.

The main area of activity lies in the setting of standards – an opportunity of which the Länder make abundant use. The Federal Council's influence is felt most strongly in decisions specifically requiring its approval. This approval rests on the principle of enumerated powers. Furthermore, the Federal Council can only lodge a protest against provisions which it does not wish to authorize and this protest can be rejected by the Federal Parliament. Even though only a few laws have so far miscarried because of the Federal Council (with a total of 3,196 laws being promulgated between 1949 and 1976 and 34 failing to materialize because they did not obtain the Federal Council's approval), the influence wielded by the Bundesrat on federal legislation nevertheless remains considerable. Its main areas of influence are: questions pertaining to the delimitation of powers between the Central Government and the Länder; administrative procedure; and the provision of funds. From the beginning, the Bundesrat laid claim to the right to express its views on all substantive points of legislation. This right assumes particular importance when different party-political majorities prevail in the Bundestag and the Bundesrat. That has been particularly the case since 1969. The Bundesrat has frequently been accused since then of acting as a lever for the Opposition with which to block the Federal Government's policy and of thus polarizing political forces. However, the circumstances of the situation are more intricate than that. The varying party-political situations in the composition of the Federal and the Land Governments serve to promote political moderation and a balance of power between the parties. The latter are compelled by virtue of the country's federal structure to bear in mind both the

Government's responsibility as well as the role played by the Opposition. In formal terms, there are no parliamentary parties in the Bundesrat. However, the Länder often coordinate their views prior to the adoption of decisions. But it would be wrong to assume that party-political considerations predominate. There are traditional parliamentary party groupings – conditioned by specific Land interests – which often prove to be stronger than party-political links. Some illustrations of this may be seen in the differing interests of Länder with a substantial income and those with a modest one, between coastal and inland Länder, between Länder close to coalfields and those far away from them. Similarly, Länder may be linked by similar structural problems such as geographical integration, the employment situation and the structure of the economy as a whole or of certain branches. It became clear from the outset that the Bundesrat alone cannot meet the need for coordination between the Federal Government and the Länder.

The most intensive form of participation, i.e. approval is admissible to a limited degree only and it excludes wide areas of policy. To this must be added a formalized procedure which is largely subject to set periods of time and which does not recognize the 'negotiating' of decisions by joint consultations. The only institution which accords with this concept is the mediation committee, which comprises an equal number of the Federal Parliament and the Federal Council members. In practice, the Federal Council often appeals to the mediation committee. However, the latter can only act when the Federal Parliament draft law. At this late stage of the decision-making process, amendments to a law are usually only possible if all participants submit to considerable pressure to reach a decision. In other words, the mediation committee is not an organ which can satisfy the regular need for coordination between the Federation and the Länder. The same applies to all the representative offices set up by all Länder at the seat of the Federal Government. In principle, they are bodies set up to transmit a flow of information and to describe the Länder's standpoint.

Intergovernmental Relations since 1949

A great many varied kinds of cooperation have developed among the Länder as well as between the Federal Government and the Länder and these differ according to administrative level, legal basis, the degree of formalization and regionalization and the terms of reference. They range from ad hoc working groups at sectoral administrative level and joint committees and commissions to the permanent conferences of departmental ministers and heads of government at Federal and Land level, and they have meanwhile been adopted in the Government's standing orders. The frequency of meetings varies considerably, but usually averages between once and fifteen times a year. Numerous Federal Government/Länder bodies are set up in accordance with federal provisions. Nevertheless, the largest number of conferences and commissions arise from voluntary cooperation. As a rule, the activities of the permanent long-term bodies and conferences are planned in accordance with standing orders. It frequently happens that ministerial conferences appoint sub-committees and

sub-commissions. In the case of problems such as land-use planning, which only concern some of the Länder, there also exist regional groupings and these may even transcend national borders.

A major role in intergovernmental cooperation is played by the conferences of departmental ministers and heads of government. In some instances, Federal ministers take part in these conferences of departmental ministers in a consultative capacity only. The Head of the Federal Chancellor's Office does not take part in the conferences of the heads of Land and Senate Chancelleries. Instead, a reciprocal flow of information takes place. A special case is the conference of ministers for land-use planning. This rests on an agreement between the Federal Government and the Länder based in turn on the Federal Law on Regional Planning. It provides an important coordinating organ for all questions of town and country planning which affect the Federal Government and the Länder.

In the meantime, a nexus of links has evolved between the conferences with a resulting mutual flow of information, opinions on joint topics for deliberation, joint meetings or working groups. The competence to issue directives, which most heads of regional government enjoy pursuant to their Land constitutions, is also reflected in the series of conferences held. If departmental ministers are unable to agree, they frequently submit the matter to the Head of the Land Government, who in turn asks for an opinion from the conferences of departmental ministers. The favourite methods used to avoid reaching a final decision are an adjournment or a remittal.

Unless otherwise stipulated in an agreement or legal provision, resolutions may only be adopted unanimously so that decisions largely depend on the adaptability of the subject-matter and the willingness of conference-participants to compromise. Admittedly, conferences may only tender recommendations to the competent bodies. Nevertheless, the often highly laborious voting process, the political esteem of government members and the publicity attendant upon conference resolutions create incalculable political factors for the decision-making process. The Länder have evinced great reluctance to institutionalize their conferences. Hitherto, only the Conference of Ministers of Culture and to a small extent the Conference of Ministers of Finance have been allowed to establish an executive secretary's office. The Conference of Ministers of Culture can look back upon a long tradition. It bears the brunt of the coordinating activities in the important field of cultural policy, for which the Länder are responsible. In view of the widely differing standpoints on fundamental educational issues, only a partial measure of success has been achieved in meeting the wish for greater uniformity, particularly in school organization, in the Länder. The Federal Government has derived from this the demand to introduce constitutional changes for a number of central issues in school education by transferring the competence for them to the Central Government. At the present time, however, there is no chance of this demand being realized.

Among the important items of inter-Land or Federal Government/Land communications, special mention may be made of the flow of information on political projects which also affect other Länder or the Federal Government, a general exchange of views and experience, the coordinating of plans and programmes and their financing, the drafting of administrative agreements and

state treaties – concerned above all with the introduction of uniform provisions, the establishment and financing of joint institutions or the implementation of experimental schemes. Particular importance attaches to state treaties and agreements on broadcasting as well as to the state treaty on the centralized allocation of university places, which ensures uniform arrangements in practice. Reference may also be made to agreements on a coordinated approach to certain areas of administration such as the statutory provisions on service and pay, the coordinating of draft laws and ministerial Orders or the preparing of opinions on draft federal laws.

The coordinating of draft legislation introduced by the governments and the elaboration of 'model draft laws' at ministerial conferences are directed towards establishing uniform provisions. An illustration from the more recent past is the drawing up of a model draft law on the police force. The idea behind this is for a standard set of provisions at Federal and Land level designed to promote certainty of justice and to enhance the effectiveness of enforcing the law and combating crime across Länder borders. Furthermore, uniform legislative initiatives by the Federal Government and the Länder hold out hopes of more easily overcoming political resistance to such laws. However, the actual laws themselves have hitherto only been enacted in individual cases.

One important factor in the Federal Government's standard-setting procedure consists in an early discussion of envisaged arrangements with the Länder. Depending on the significance of the subject-matter, this takes place at various levels of ministerial administration, in joint working groups or in conferences of departmental ministers and heads of government. In this way, the Federal Government avails itself of the special administrative experience and expertise gathered by the Länder. At the same time, the public discussion gives it an opportunity to examine the extent of the Länder's willingness to support the intended provisions during the remaining procedure. This question assumes particular importance when the Federal Council's approval is required for the regulations in question. A good example of this may be seen in the adoption of a statutory decision on the share of turnover tax to be allocated to the Federal Government and to the Länder. As a rule, such an agreement is concluded for a period of two years. The result usually flows from negotiations between the heads of government following protracted discussions. With a view to placing the procedure on a more objective basis in future, agreement has now been reached on a joint commission of experts whose terms of reference will be to lay down criteria for decision-making.

The coordinating of legislative initiatives has now become part of routine cooperation between the Federal Government and the Länder. In the case of important arrangements, tactical and political considerations often figure prominently. The opinions adopted depend on whether there is a whish to support or prevent an envisaged provision or else to obtain adequate scope for alternative decisions during the remaining parliamentary procedure. In order to avert the danger of undermining parliamentary procedures by means of informal agreements, the Länder usually refrain from debating in other bodies any subjects already under discussion in the Federal Council.

The few points already made about intergovernmental relations indicate the development in practice of a system of cooperation which was only partially envisaged in the Constitution. This usage soon attracted criticism. The censure concerned, in the first place, the mixed financing by the Federal Government and the Länder as well as co-planning and co-administration by the Federal Government in areas for which it does not possess any clear-cut jurisdiction. The Federal Government has participated in the Länder's functions via a large number of funds and brought influence to bear on the preparing and implementing of programmes via its provision of funds. However, the legal aspirations have not been directed so much towards curtailing the integration of functions between the Federal Government and the Länder. The main consideration was how to provide intergovernmental cooperation with an explicit constitutional basis which would assure the Federal Government of the capacity for exercising adequate influence in major policy-making areas in the overall interest of the State.

The constitutional preconditions for this cooperation were created between 1967 and 1969. That period marked a clear turning point in the growth of the federal system in this country. After having traditionally been characterized by multifarious forms of cooperation, German federalism entered a new phase of cooperation between the Federal Government and the Länder – generally designated as 'cooperative federalism'. In addition to a fiscal reform, the main points in constitutional reform are: questions pertaining to the achievement of overall economic equilibrium (Article 109 of the Basic Law); co-planning and co-financing by the Federal Government within the framework of joint tasks (Article 91a, Basic Law); and the provision of financial assistance for investments by the Länder and the local authorities (Article 104a, figure 4 of the Basic Law).

1. Overall Economic Control

Following the first major recession in trade and industry since the founding of the Federal Republic of Germany, greater efforts have been made to coordinate the State's budgetary techniques more efficiently with the conditions underlying a free market economy. Keynes' macro-economic theories figure conspicuously in the general public debate on this subject. They recommended forms of State influence which appear compatible with free-market principles. These endeavours resulted in the constitutional amendment of 1967, and a number of laws were enacted on this basis. Particular significance must be assigned to the 'Stability Law' of 1967 and the 'Budgetary Principles Law' of 1969. These place the obligation upon the Federal Government, the Länder and the local authorities within the framework of their scope for political action to contribute towards steering the desired course of economic growth and the achievement of overall economic equilibrium. The goals of this steering process are to attain price stability, a high level of employment, a good balance in foreign trade and an appropriate and steady degree of economic advance. Doubts are sometimes expressed as to whether these economic goals can be realized simultaneously.

However, the decisive thing for our study lies in the fact that the Federal Government, the Länder and the local authorities are obliged in a key area of their terms of reference, i.e. in budgeting and public finance, to take macro-economic aims into account and to orient their decisions towards these joint goals. The Federal Government can thus intervene directly in the Länder's financial policy inasmuch as it may demand, subject to the Federal Council's approval, the provision of funds which must only be used for the purpose of promoting overall economic equilibrium. As it is independent of the Government, the Bundesbank can indirectly influence the Länder's financial policy by controlling the money supply. The Bundesbank gives due consideration to the federal structure of the State by virtue of its decentralized institutions such as the Land Central Banks and the composition of membership of the supreme decision-making organ, the Central Bank Council. However, the main emphasis of steering instruments lies in the coordination of the financial and economic decisions adopted by the Federal Government and the Länder. Apart from the conference of finance and economic ministers and their subordinate committees, the favourite organs are the 'interministerial economic policy council' and the 'financial planning council'. These were formed by federal law and placed under the competent federal minister. Admittedly, these committees merely submit recommendations. Moreover, no success has so far been achieved in working out proposals on medium-term financial planning which go beyond an approximate extrapolation of changes in income and expenditure. Nevertheless, they help to improve the flow of reciprocal information and to back overall economic responsibility. Be that as it may, practical experience has shown how much the Länder's budgetary policy is influenced by the Federal Government's policy on public spending. This is especially the case since the Länder and the local authorities fear that any substantial rise in federal expenditure may result in a re-allocation (to their disadvantage) of the revenue accruing from the joint turnover tax. In order to counteract the increase in expenditure, an attempt is repeatedly made to reach agreement on restricting those legal enactments which result in large-scale disbursements. But the only agreements which have hitherto had any success are those designed to bring about reductions in employment costs in the civil service.

Another institution called into being by the legislators in order to improve coordination is that of 'concerted action'. Participation is not limited to the representatives of the Federal Government, the Länder and the local authorities but also extends to those of trade and industry, the trade unions and the central business associations. It developed as a discussion group which began with a series of meetings. Its central feature was the flow of information on overall economic data and their evaluation. The expectations placed in the 'concerted action' after its preliminary success in combating the recession of 1966/67 were not fulfilled during subsequent years. Since 1977, it has no longer met at full strength following a controversy between entrepreneurs and trade unions on co-management in industry. Following the clear-cut ruling pronounced by the Federal Constitutional Court on 1 March 1979, however, there have again been signs of reviving interest. From the very beginning, however, the institution of concerted action evoked socio-political misgivings because it appeared likely to

blur the dividingline between the State and society and to disrupt the mechanisms of a free-market economy. Broadly speaking, the coordinating impact of the concerted action is fairly small. None the less, this discussion group has proved to be a useful instrument for reciprocal information designed to promote the overall sense of economic responsibility among all participants.

The statutory instruments of economic global steering have made a significant and difficult field of policy-making a subject for intergovernmental relations. The prevailing strategy is voluntary coordination and cooperation, i.e. 'government by persuasion'.

2. Joint Tasks and Financial Assistance from the Federal Government

The financial reform of 1969 created a constitutional basis for joint planning and for the mixed financing of investment by the Länder and the local authorities. The arrangements for cooperation between the Federal Government and the Länder differ in regard to their statutory prerequisites, the type of cooperation (whether determined by law or by administrative agreement) and the degree of participation by the Federal Government.

The joint tasks are regulated by law and envisage a common framework planning by the Federal Government and the Länder in addition to co-financing by the former pursuant to constitutional or statutory apportionment formulae. They are restricted to certain areas which appeared to be particularly important when the joint tasks were undertaken for the first time: promoting the construction of new universities; and improving the economic structure of the regions and of the farming sector and of coastal protection. The coordinating organs for individual joint tasks are planning committees in which each Land has a vote and the Federal Government as many votes as the Länder together (11 votes). However, the authoritative decision on the amount of funds is set forth in the budgetary laws enacted by the Federal Government and the Länder.

It is, however, rare in practice to find the parliaments which vote the budgets adjusting the relevant appropriations. Decisions adopted by the planning committees require a majority of three quarters of the votes cast. The planning committees draw up four-year outline plans, which are then extrapolated annually. These outline plans govern the targets of promotional schemes, the types of project to be promoted, the areas to be assisted under the programmes for improving the economic structure of the regions, the criteria to govern promotion and the type and scale of assistance. Responsibility for implementing the outline plans rests with the Länder. Nevertheless, the scope of action left to the Länder within the framework of joint tasks depends on the extent to which the outline plans are translated into specific terms and the financial resources which the Federal Government virtually stipulates in practice. But the Länder are free to earmark additional funds in supplementary programmes and this often takes place. But that in turn calls into question the expectation of establishing equal opportunities for receiving assistance. Another problem consists in the allocation of funds among the individual Länder, since the considerations of proportional distribution also play a role in addition to actual requirements. This manifests itself even more forcibly in regard to the Federal Government's investment assistance.

With a view to clarifying the financial volume involved, it is interesting to consider the budgetary appropriations for the following joint tasks:

	DM millions
a) Construction of new Universities (1980)	
Federal Government's share	950
Länder share	950
	1,900
b) Improving the economic Structure of the Regions (1980)	
Federal Government's share	354
Länder share	354
	708
Investment allowances (from income or corporation-tax revenue) 1980	930
	1.638
c) Improving the Structure of the Farming Sector and of Coastal Protection (1979)	
Federal Government's share	1.375
Länder share	888
	2.263
of which:	
Improving the Structure of the Farming Sector	
Federal Government's share	1.254
Länder share	836
	2.090
Improving coastal protection	
Federal Government's share	121
Länder share	52
	173

The most difficult area for reaching a form of intergovernmental cooperation between the Government and the Länder proved to be that of education and science. At the same time, it should be borne in mind that the decentralized system of education and schooling in Germany is the outcome of a historic process of growth. Under the Basic Law, too, the responsibility for education has largely remained in the hands of the Länder. Today, it makes up the main component in the Länder's autonomous functions. No consensus was achieved on any statutory form of cooperation. Under the constitutional change of 1969,

it was left to the Federal Government and the Länder to reach agreements on cooperating on questions of educational planning and the promotion of scientific research. The foundation for systematic cooperation was the administrative agreement of 1970 between the Federal Government and the Länder on setting up a joint commission for educational planning. Every Land has one vote in this Commission. The Federal Government, which sends seven delegates, possesses the same number of votes as the Länder altogether. Decisions require a majority of three quarters of the votes. The Commission prepares recommendations upon which the Federal and Land heads of government reach a final decision. In order to ensure as large a consensus as possible, a resolution requires the approval of nine heads of government. Nevertheless, it is only binding for those who voted for it. The Länder preferred not to submit to majority decisions in a field of activities which particularly concerns a Land's individual identity. As regards the promoting of research, a simplified procedure is envisaged in the interest of accelerating the process.

The Federal Government and the Länder have come to terms in a number of agreements designed to promote education and scientific research. One outstanding example was the outline agreement on the joint promotion of research of 1975 on the basis of which a number of other implementing agreements were concluded. These superseded the earlier Länder agreements on the joint promotion of research. In 1978, expenditure by the Federal Government and the Länder amounted to DM 96 million for educational planning and DM 900 million for the promotion of research.

Particular difficulty attached to the coordinating of educational planning. An overall plan in this field was not in fact agreed until 1973 following arduous deliberations by the Commission for Educational Planning and the heads of government at Federal and Land level. It indicates approximate targets for the development of educational curricula and organization over a period of 10 to 15 years – including an educational budget which the heads of government approved with reservations due to the inherent risks of financial planning. To this must be added the schemes for the gradual realization of the overall plan and the programmes for the implementation of priority measures. Furthermore, the large increase in the number of students has resulted in agreements among the heads of government on the provision of additional study- and workplaces. So far, it has not proved possible to extrapolate the overall educational plan. It has miscarried because of the different views prevailing on education in general and the organization of schools in particular. The provision of funds for further planning is also a matter of controversy. The instrument of joint educational planning has not yet been able to overcome the obstacles of a divergent approach to educational policy.

As the Commissions largely function in accordance with administrative rules, they find themselves unable to cope with highly controversial political issues when called upon to establish a consensus on such matters. A further possibility for encouraging the coordination of educational facilities lay in the institutionalization of political guidance. The Federal Government and the Länder concluded agreements on the appointment of two committees of experts, the educational council and the scientific council. The limited agreement on the Educa-

tional Council, set up in 1965, was not renewed because it did not succeed in working out analyses and proposed solutions acceptable to all Länder. The Science Council began its work in 1957 and still exists today. It comprises two commissions, the scientific commission to which the representatives of various academic disciplines are appointed, and the administrative commission whose members comprise delegates with administrative experience chosen by the Federal Government and the Länder. Its recommendations on the further development of the universities and on the promotion and organization of scientific activities enjoy great esteem.

The fate of the educational and the scientific councils clearly demonstrates that political guidance is most likely to prove successful when it operates within the framework of anticipated proposals and solutions capable of obtaining a consensus. As a rule, they are not the appropriate fora for achieving a consensus on a controversial subject deemed to be of fundamental importance. Moreover, they do not furnish a suitable substitute for political decisions.

As a further instrument for cooperation between the Federal Government and the Länder, the constitutional amendment of 1969 introduced the provision of financial assistance for significant investments on the part of the Länder and the local authorities. Unlike the joint tasks, this is not confined to certain fields of investment or activity. Nevertheless, the preconditions are more closely circumscribed. They arise from the Federal Government's overall economic responsibility and its function in bringing about financial equalization. These duties are discharged on the basis of laws which require the approval of the Federal Council as well as administrative agreements. Although the Federal Government's participation does not go so far as it does with joint tasks, it is not confined solely to financial assistance. The Federal Government can also bring influence to bear on the given programme via the targets and criteria chosen for promotion. The expectations that the new rule would curtail the Federal Government's old policy on the allocation of capital and place it on an explicit basis have only been partially fulfilled. The Federal Government makes extensive use of this rule. Statutory provisions exist for the following sectors:

- publicly-assisted house building and the modernization of dwellings;
- promotion of urban development;
- improvement of urban traffic conditions; and
- provision of funds for hospitals.

In these areas of investment, the budgetary appropriations agreed by the Federal Government and the Länder for 1980 amount to DM 11,000 million.

In addition, there exist numerous administrative agreements on promotional programmes. Since 1974, programmes involving a total expenditure of over DM 30,600 million have been introduced for the advancement of the economy. The initiative for these promotional programmes largely derives from the Federal Government. It thus adopts the decisions on the political priorities in programmes and their funding and the Länder find it difficult to resist this. Consequently, the Federal Government's initiatives are meeting with an increasing amount of criticism from the Länder, particularly since the effectiveness of the promotional programmes often does not meet expectations.

Differences of opinion frequently arise on the admissibility and the procedures to be adopted in preparing and implementing investment assistance. In some cases, the Federal Constitutional Court had to provide clarification. However, it has now been announced that unambiguous procedural arrangements will be introduced under an outline agreement between the Central Government and the Länder. They are intended above all to ensure that the Federal Government and the Länder inform each other as soon as possible about their proposals on promotional programmes and then specify the extent of the Federal Government's participation. Moreover, they ought to prevent the Federal Government from entering into direct relations with the recipients of assistance. The Länder are pressing the Federal Government to ensure that it first discusses proposals on financing facilities during the conference of heads of government and does not subject the Länder from the beginning to the pressure of public opinion or of interested parties. Although the financial reform of 1969 created a statutory framework for cooperation between the Federal Government and the Länder in the field of investment promotion, its implementation in practice still meets with considerable difficulties. Moreover, it has not proved possible to deter the Government from financing projects for which it does not possess explicit jurisdiction. The Länder constantly find themselves having to defend an unpopular defensive position.

Intergovernmental Relations within the European Communities and in foreign Relations

EEC projects now cover ever-widening fields of activity and these affect the jurisdiction of the Länder. As a result, they are gaining more and more importance as a subject for intergovernmental relations. Problems arise above all in regard to competence for administration and the provision of the required funds. It is widely agreed today that administrative powers must be based on inner-state federal rules. In other words, the Länder are basically competent for the implementation of EEC provisions. However, the Länder question any general financial competence on their part for EEC matters as they are not expressly mentioned in the Constitution. In practice, makeshift arrangements have been introduced with temporary provisions – above all on joint financing by the Federal Government and the Länder. However, it has proved to be awkward for Länder that they are completely dependent on the Federal Council's modest degree of influence in EEC matters, even in those spheres for which they hold exclusive competence or which affect the Länder's major interests. After a long series of negotiations, the heads of government at Federal and Land level finally signed an agreement guaranteeing an expeditious flow of information and greater consideration for the Länder's viewpoint. The Länder approved a special procedure for their dealings with the Federal Government, but no practical experience has yet been gained with these arrangements. So far, no accord has been reached between the Federal Government and the Länder on the latter's constitutional responsibilities in international agreements designed to govern issues which, the Länder believe, fall exclusively within their jurisdiction. Pract-

ical arrangements have, however, been agreed for those treaties and for such treaties as affect the essential interests of the Länder. The 'Lindau Agreement' of 1957, an odd item of constitutional law, guarantees timely participation by the Länder. A permanent committee of Länder representatives is available for discussions with the Government. The Agreement has proved its value as an appropriate basis for smooth cooperation between the Federal Government and the Länder.

A critical Development in intergovernmental Relations

The federative system practised in the Federal Republic of Germany has been marked by the growth of multifarious forms of intergovernmental relations. But it has now reached a stage where the advantages of the federal system are being called into question more and more. These include the clear correlation of political responsibilities, the achievement of a balance between the powers and between centralized and decentralized competence and finally an effective and flexible system of decision-making. Today, cooperative federalism elicits a great deal of criticism with the following three topics playing a special role: intergovernmental relations and parliament, the impact of cooperative federalism on the Länder's sovereignty, and the efficiency of cooperative decision-making in practice.

1. Intergovernmental Relations and the Parliaments

Cooperation between the Government and the Länder operates principally at governmental and administrative level. The Land parliaments deplore the fact that intergovernmental cooperation narrows their scope for independent decision-making due to the conclusion of virtually non-rectifiable firm agreements. In order to counteract the threat of a loss of function, the Land parliaments are pressing for a wider measure of influence. The views expressed on the constitutional limits of parliamentary powers in the context of intergovernmental relations are marked by controversy. A number of Länder have now started to arrange procedures with the parliaments in order to ensure the timely provision of information on the subjects for negotiation and on questions affecting the Federal Council. Nonetheless, there are considerable differences in the volume of information which has to be provided. The parliaments have clear reservations in regard to the financing of joint tasks. However, the planning procedure – governed as it is by the rules of administrative routine – gives the parliaments little opportunity to bring any influence to bear.

Cooperative federalism has substantially widened the scope of decisions reached by means of negotiations. In this way, it has strengthened the position of the Executive, which traditionally bears responsibility for the conduct of negotiations. The participation by the parliaments in intergovernmental decisions is intended to create a balance. Yet it only represents a makeshift arrangement and thus renders the sophisticated coordinating arrangements even more difficult. A more promising line of approach would be to restrict intergovernmental relatives to the requisite level. For the federal developments which have taken place

threaten to jeopardize the equilibrium of powers. It has become evident from the everyday practice of the federal system that the requirement to practise democratic methods and the constitutional need for a division of powers are subject to certain limits.

2. Cooperative Federalism and the sovereign Rights of the Länder

The closely-knit web of intergovernmental relations has not only furnished the Länder with negotiating opportunities, but also created numerous new dependent relationships. The expansion of the given legal provisions had in any case already curtailed the Länder's range of action. This was augmented by court practice which, similar to the 'implied powers' of American constitutional law, has also acknowledged the Federal Government's unwritten powers. The Federal Government has made exhaustive use of its powers in the field of conflicting legislation and the enactment of scope-defining laws. Most spheres of activity are governed by federal legislation. The Federal Government has also availed itself abundantly of the instruments of co-administration and co-financing, which were reinforced by the constitutional changes of 1967/69. Since the legislative initiatives undertaken by the Federal Government substantially tie up the Länder's complementary funds, this further narrows the financial and thus also the political latitude of the Länder. Finally, the expansion of intergovernmental relations between the Länder (which has long since reached the stage of self-regulating routine) also weakens the Länder's powers of autonomous decision.

One major goal in federal cooperation is the establishment of as equal a level of living standards and conditions as possible. This objective is of special significance in a country like the Federal Republic of Germany with its high degree of integration within a small geographical expanse. A goal of no less importance under a federal system is that of bringing out the political diversity of the Länder. The close cooperation between the Federal Government and the Länder involves the danger of aiding and abetting the widespread tendencies towards equalization and levelling the characteristic differences between the Länder. At the same time, the enhanced degree of cooperation covering most of the Länder's spheres of activity encourages a defensive strategy of reciprocal safeguards and thus avoids the risk of independent political decision-making. The advance of cooperative federalism has reached a limit which ought not, in the interest of Länder sovereignty of decision-making, to be transcended. Today, the federal commandment is no longer more cooperation but less cooperation: not more joint conferences, but fewer of them.

3. On the Effectiveness of cooperative Federalism

The expectations placed in the enhanced scale of cooperation between the Federal Government and the Länder in the context of cooperative federalism have attained only partial fulfilment. The Federal Government complains that the right of participation accorded to it in outline planning and investment financing does not suffice for asserting overall national interests in these spheres. The Länder now voice more criticism of the distribution of powers, as the Federal Government and the Länder mutually obstruct each other and thereby

bring about a blurring of responsibilities for the defined functions. Attention is also drawn to the fact that the assumption of responsibility for joint tasks has not resulted in the desired elimination, to an adequate degree, of the financial and structural inequalities between the Länder. It is, above all, the more prosperous Länder which – irrespective of party-political considerations – voice the demand for the elimination of joint tasks. The question of removing or limiting mixed financing has meanwhile become a permanent topic of discussion for the heads of government. It also formed a major item for the commission of enquiry appointed by the German Bundestag on constitutional reforms. However, this body merely recommended modification of the joint tasks and the Federal Government's investment assistance. Despite the criticism voiced about the joint tasks – a subject which figures prominently in the experts' work on this theme – the inherent advantages ought not to be overlooked, either. After all, the integration of functions has created an additional guarantee that priority treatment will be given to such tasks as seem particularly worthy of promotion from the standpoint of the State as a whole.

Nevertheless, the difficulties which have emerged in practice indicate that the institutionalized compulsion towards co-administration and co-financing is not recommendable as the standard form of federal cooperation. This compulsion ought to be confined in substance and time to activities which are indispensable from the standpoint of the State as a whole. On the basis of ten years of experience, a close look should therefore be taken at the possibility of replacing the Federal Government's joint tasks and investment assistance by an improved general fiscal adjustment. The need for coordinating target plans can be met by the other forms of intergovernmental relations. One unsatisfactory feature remains the transmission of information on longer-term political concepts. The long-term impact of social processes indicate the need to resume attempts to appoint joint working groups for the purpose of analyzing social lines of development based on standard criteria.

Despite all the criticism voiced about individual forms of intergovernmental relations, there still exists a wide measure of agreement on the foundations of the federal system which has to sustain these relations. Their outstanding criteria are appropriate strategies of a division of labour and of cooperation which mutually complement each other. The federal system has proved its value in a sophisticated industrialized society as the model for a balance of power and for effective decision-making.

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LOCAL GOVERNMENT in the UNITED STATES

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◆ *Chapter 1* ◆

Is There a System of Local Government in the United States?

American local government is characterized by great variety and diversity[1]. Indeed, even the sheer numbers are large: the U.S. Bureau of the Census enumerated 83,166 local governments in 1987. These government units are, in a sense, organized in 50 different ways, because the laws providing for their establishment and general control derive primarily from the 50 state constitutions and from legislation enacted by each of the states. Further, nearly one-half of the states make provisions for "home rule," allowing local residents to draft their own charters for particular units of local government. Home rule greatly increases the diversity of forms among units of local government even within a single state.

However they are organized, local governments in the United States play an important role in providing key public services. Among the services they most frequently provide are police and fire protection; education; public transit, streets and highways, airports and seaports; sewage and solid waste collection and disposal; public health and hospitals; public welfare; parks and recreation; housing, urban renewal, and land-use control; public records and courts; water

supplies; and many different public utilities. These services affect every citizen.

Over 80,000 counties, townships, municipalities, school districts and other special districts, plus tens of thousands of quasi-governmental organizations, all organized under the laws of 50 different states, constitute local government in the United States. The critical question is whether all of these elements form a *system* of local government or whether there is simply unorganized chaos. Much of the literature on local government suggests a crazy-quilt pattern of local government organization that is comprehensible neither to local citizens nor to the professional analyst. What exists today, it is alleged, is simply an accretion of historical happenstance that makes no sense to a rational observer. This crazy-quilt pattern, it is argued, emphasizes archaic parochial interests and neglects the broader transcending public interest of the larger community.

When Tocqueville visited the United States in the early 1830s, he made a somewhat similar observation about local government:

> The appearance of disorder which prevails on the surface leads one to imagine that society is in a state of anarchy; nor does one perceive one's mistake until one has gone deeper into the subject (Tocqueville, 1945: I, 89).

Tocqueville implied that it was necessary to move deeply into the subject of local government before an order could be perceived. We will argue that the same is true today. Before one can understand local government in the United States, one must move deeply into the subject. At the beginning it is necessary to gain some familiarity with the typical units and broad similarities in local governmental structures. We then need to be prepared to see how communities of people organize themselves through units of local government to realize joint aspirations and provide for their joint needs. The great diversity of forms creates opportunities to examine how the structures of local governments affect the delivery of public services to citizens.

In spite of the diversity within and among states, some *general* similarities among systems of local government are present across the United States. All states utilize both general and special purpose local governments. Among general governments, all states utilize municipalities (cities, villages, and incorporated towns) and 48 states utilize counties or similar units; only 20, however, use townships. All use special purpose districts, the most common of which are school

Table 1.1
Local Governments in the United States

Types of Government	Number[a]	Number of Elected Officials[b]	Full-Time Employment[c]
Counties	3,042	62,922	1,573,000
Municipalities	19,205	134,017	2,033,000
Townships	16,691	118,966	219,000
School Districts	14,741	87,062	3,347,000
Special Districts	29,487	72,377	405,000
Total	63,166	475,344	7,577,000

Sources: [a]U.S. Bureau of the Census, *1987 Census of Governments. Preliminary Report*, p. 1.

[b]U.S. Bureau of the Census, *1977 Census of Governments*, Vol. 1, No. 2, p. 9.

[c]U.S. Bureau of the Census, *Public Employment in 1985*, p. 2.

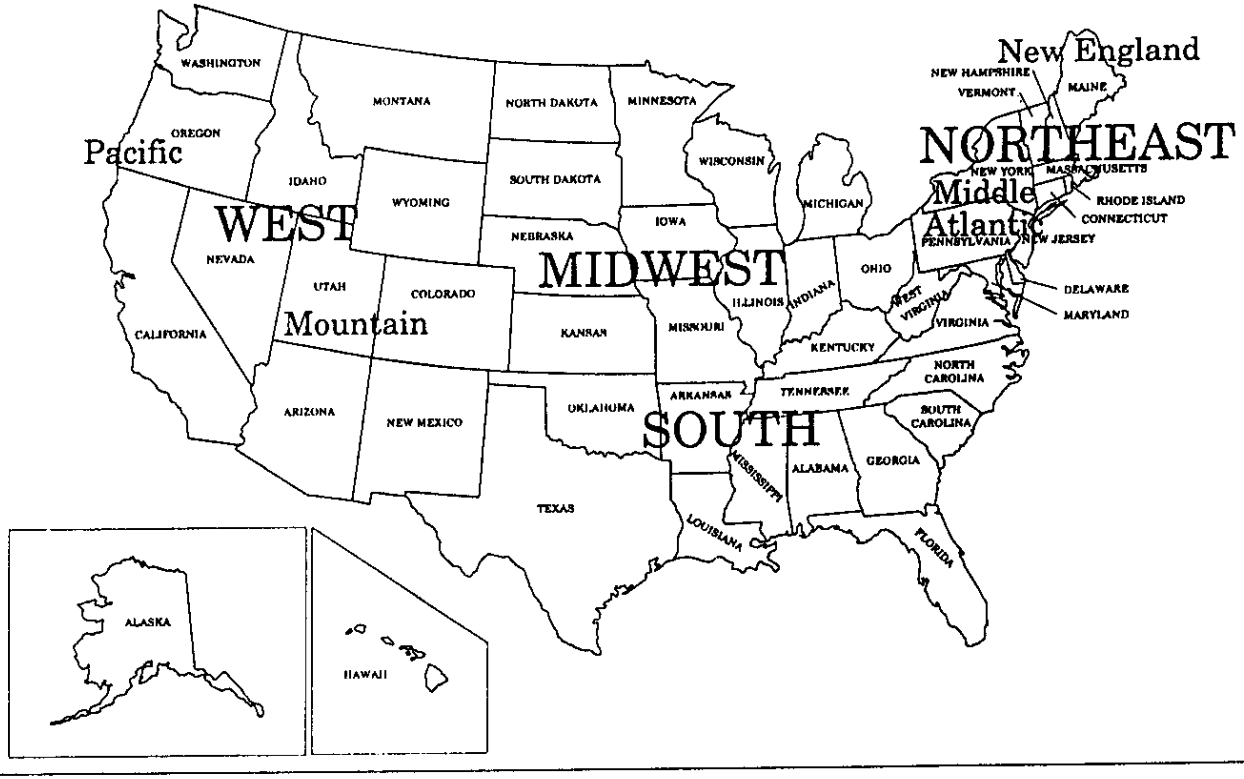
districts. The numbers of these major types of local governments, as well as the number of locally elected officials and the full-time equivalent (FTE) employment by each general type, are shown in Table 1.1. This provides some indication of the magnitude of people working in different kinds of local government activities.

For statistical and general descriptive purposes, similar kinds of local governments within states and from different states are often lumped together. One must be careful, however, not to lose sight of the great diversity that exists even *within* common types.

Types of Local Government

Counties. Fewer in number than other types of local governments, counties or similar units exist in all but two states: Connecticut and Rhode Island. Alaska and Louisiana do not have units formally called counties, but somewhat similar units of government in the former are called boroughs and in the latter called parishes. Since counties are generally the most inclusive units of local government, 89 percent of the total U.S. population is served by a county unit. Several large cities (New York, Denver, Honolulu, Philadelphia, San Francisco, and St. Louis are the most notable examples) are not overlapped by counties due to consolidation of city and county units. In Virginia, counties do

Figure 1.1
States and Regions of the United States



Source: Savas (1977: 57).

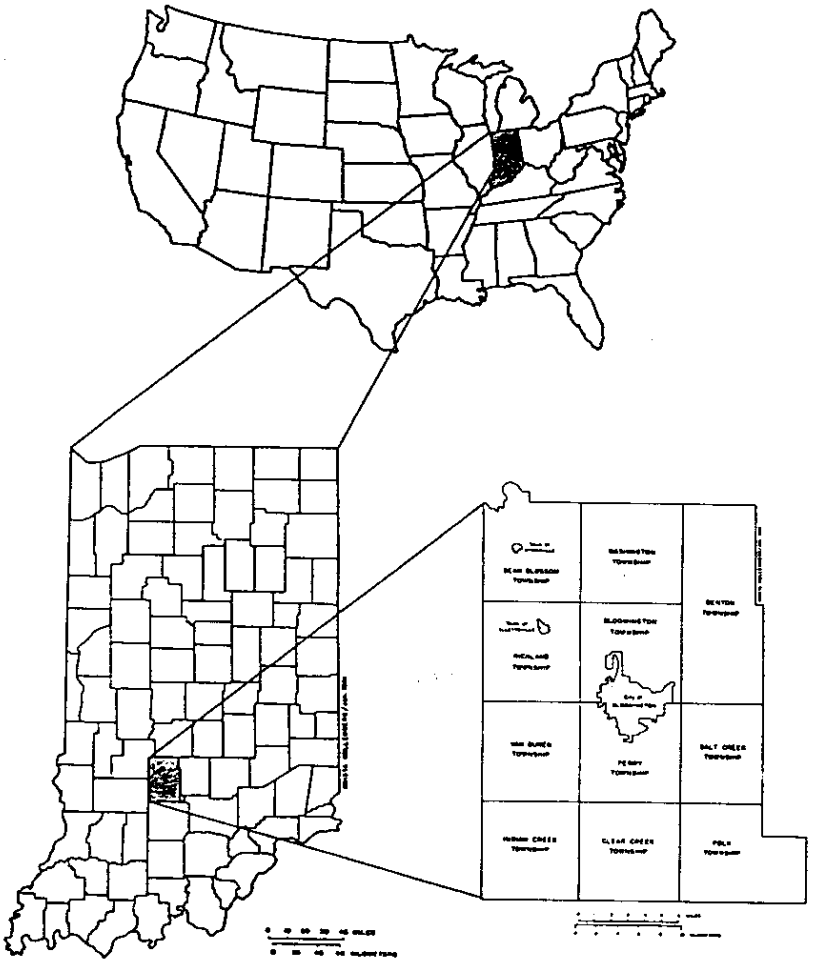
not overlay the independent cities in that state. Where counties do not encompass cities, the cities perform the functions county governments would otherwise.

In general, counties serve as both administrative subdivisions of the state government (for such purposes as registering births, deaths, and marriages, and for administering relatively uniform statewide activities such as maintaining public records, the courts, the organization and conduct of elections, law enforcement, and basic measures of public health) and as independent local governments responding to the needs of their particular citizens. Almost half of all counties own and operate landfills; over a third have their own libraries; and about one-fourth operate airports and provide fire protection. Counties in large urban areas have sheriffs' departments comparable to large city police departments, usually offering a comparable range of services. But in rural areas, especially in the thinly populated mountain and desert regions of the American West, counties provide a more limited variety of services.

Counties also differ dramatically in the number of residents served. In 1982, for example, the range of populations was from 91 residents in Loving County, Texas, to over 7 million residents in Los Angeles County, California. The average county population was 67,002. The 156 counties with populations over 250,000 (constituting 5 percent of all counties) served 72 percent of the United States population (U.S. Bureau of Census, 1982*a*: vii).

Townships. While counties are the basic comprehensive governmental unit in most states, in New England the town or township is the basic unit of local government. (Counties in New England are primarily limited to the performance of judicial functions pertaining to the organization of courts.) In New England, New Jersey, and Pennsylvania, and to a lesser extent in Michigan, New York, and Wisconsin, towns or townships are assigned relatively broad powers and frequently undertake activities associated with municipal governments. In the American Midwest, townships are organized as smaller units within counties. In contrast to New England, the Midwest townships are based upon land survey units of 6 miles square comprising 36 sections of 1 mile square each. This arrangement was viewed as creating a rational basis for the organization of the smallest general unit of local government. The result is that nearly 55 percent of all townships serve fewer than 1,000 residents, while only 1,019 had

Figure 1.2
Levels of Government: Federal, State, and County



10,000 or more residents in 1982. In the arid West, however, where a section of land is often inadequate to support a single farm family, the township as a unit of government has been abandoned.

Municipalities. Municipalities (cities, villages, and incorporated towns) are units of government established to serve more densely concentrated populations with public services. Municipalities are generally self-governing corporations designed to serve the special needs of their residents, and are usually created by local initiative on the part of people desiring to incorporate. More than 141 million people reside within the boundaries of a municipality, and more than 57 million live within cities with populations over 100,000. Over half of all municipalities, however, serve 1,000 or fewer residents, although these units account for only 3 percent of the U.S. population. Thus, while municipalities are generally created to provide urban-type services beyond what would be provided by a county or township government, residing in a municipality does not necessarily mean residing in a big city. Still, in spite of the fact that a majority of municipalities are quite small and perform a limited range of functions, all municipalities, as well as counties and townships, are still classified by many scholars as "general purpose" governments.

Special Districts. Units of local government that function as limited purpose governments are often referred to as "special districts." The 14,741 school districts responsible for free public education are the most common of these special districts. In addition, there are 1,500 "dependent" school systems that are regarded by the U.S. Bureau of the Census as agencies of county, municipal, township, or state governments. Thirty-three states assign responsibility for elementary and secondary public schools to independent school districts; in five states and the District of Columbia, public schools are organized as departments of city, county, or state government; and the remaining twelve states utilized a mixed system of independent school districts and departments of municipal or county government. The school district or school corporation is a limited purpose, quasi-municipal corporation organized to finance and maintain a public school system for the education of the children within the district. The reliance upon independent school districts has been based on an assumption that government of educational affairs should not be dominated by the same partisan interests that run city hall or the county courthouse; thus

Table 1.2
Limited Purpose Special Districts

Function	Number	Percent
Natural resources	6,473	22.0
Fire protection	5,063	17.2
Urban water supply	3,056	10.4
Housing and community development	3,460	11.7
Cemeteries	1,629	5.5
Sewerage	1,605	5.4
School building authorities	707	2.4
Parks and recreation	1,004	3.4
Hospitals	784	2.7
Libraries	830	2.8
Highways	620	2.1
Health	481	1.6
Airports	367	1.2
Other single-function districts	1,491	5.1
Multiple function districts	1,917	6.5
Total	29,487	100.0

Source: U.S. Bureau of the Census, *1987 Census of Governments. Preliminary Report*, p. 3. (Does not include school districts.)

members of the school district governing boards are usually elected in nonpartisan elections. State departments of education typically exercise greater control over local school districts than do other departments of state government over other units of local government.

Limited purpose, quasi-municipal corporations are being used for an increasing number of local government functions, as shown in Table 1.2. They were first organized to undertake land and water resource development in rural areas. In the Midwest they were originally used to develop drains for removing surplus water from land affecting a group of farmers, while in the arid West they developed waterworks for irrigating land.

These special district arrangements were quickly applied to a variety of resource development and public utility services. California provides statutory authorization for the organization of a large number of these units, including districts for irrigation, drainage, water conservation, flood control, public utilities, sanitation, etc. In 1987, there were 1,098 school districts in the State of California plus 2,732 special districts of other types.

In addition to the nearly 30,000 special districts organized within particular states, a number of interstate entities have been created with the consent of the United States government. The U.S. Bureau of the Census identifies 20 interstate entities, all of which involve two states (except for the Washington Metropolitan Area Transit Authority, which involves the two states of Maryland and Virginia plus the District of Columbia). Of the 20 entities, 7 are bridge authorities, 4 are bay or port authorities, 4 are airport authorities, 2 are park authorities, 2 are metropolitan development districts, and 1 is a metropolitan transportation authority. Some of these, like the Port Authority of New York and New Jersey, perform a wide variety of functions related to urban transportation and economic development.

As patterns of suburbanization began to develop, limited purpose, quasi-municipal corporations were also created to provide urban-type services for suburban and rural areas, including fire, police, sanitation, domestic water, and other services. In the course of time some units, such as irrigation districts, have been authorized to provide an increasing number of services for their residents such as domestic water supply, drainage and sanitation services, airport facilities, cemeteries, etc.; in fact, some irrigation districts provide a wider range of services than some townships. The distinction between general purpose governments and limited purpose governments is not easy to draw and may lead to erroneous conclusions if applied categorically.

The concept of the limited purpose, quasi-municipal corporation has also been applied to the organization of municipal-type services for municipalities or other units of local government. Municipal water districts were first authorized in California to allow several adjoining municipalities to form a single water district for importing water from a distant source to supply all municipalities within the district. Metropolitan water districts supply imported water to municipalities and units of local government such as county water districts and county water authorities, which in turn may supply water to any unit of government within a county. Special districts have been organized in urban areas to provide sanitation facilities, public utility services, transportation services, and the provision of other governmental functions. Some states have authorized existing units of local government to create limited purpose, quasi-municipal corporations as joint operating agencies to provide any service to local governments that

those governments can separately supply for their residents, so long as the joint agencies assume all costs and liabilities for doing so.

Quasi-Governmental Organizations. Counties, townships, municipalities, school districts, and other special districts make up the *formal* system of local government in the United States. Quasi-governmental organizations, however, have also been developed to serve the interests of particular groups of local residents.

Among the most common types of quasi-governments are homeowners' improvement associations created by real estate developers to enable residents in a development area to deal with common problems. One becomes a member of such an organization by virtue of property ownership within the association's boundaries. These arrangements generally depend upon two legal devices: (1) a restriction in the property right conveyed to the new owner of a property and (2) corporate organization of all property owners with reference to those aspects of a property right that are held in common. A homeowners' improvement association, for example, may be organized by the developer of a subdivision in which the title to individual lots is subject to restrictions that provide for joint facilities such as streets, sidewalks, recreational areas, and the regulation of future patterns of land use. These title restrictions are then accompanied by bylaws for a homeowners' improvement association. Use is exercised collectively by the residents as members of the association. Provision is usually included both for general assessments to cover costs of the association and for special assessments to finance improvements for the joint benefit of the community of residents. Penalties can be levied for nonperformance and remedies can be secured through a civil court for nonperformance of contractual obligations. A homeowners' improvement association may then be a private government supplying some range of public facilities and services for its local residents.

A similar pattern of organization may be created among apartment dwellers who are organized either as a cooperative[2] or as a condominium. The individual acquires title only to an individual apartment; title to common facilities in the apartment building and surrounding grounds is vested in a corporation or quasi-corporation comprising all of the resident-owners of individual apartments. The corporation can then provide for common facilities and services payable as charges levied against each resident. The logic is similar to

that of a homeowners' improvement association, but is applied to multiple-family residences in larger apartment complexes.

The Washington, D.C., metropolitan area, for example, has 2,000 to 3,000 private associations including condominiums, cooperatives, homeowners' associations, town house associations, and planned urban developments. A planned realty development, such as Leisure World, spends $20 million a year and provides governmental services to 5,550 residents—more than most of the municipalities in the United States. The Community Associations Institute, an association of these types of organizations, estimates that there are approximately 110,000 in the country as a whole (Garreau, 1987).

Because homeowners' improvement associations, housing cooperatives, and condominiums are forms of organizations specifically created to serve the interests of local residents, such instrumentalities are readily available to articulate demands upon public officials for public services impinging upon local neighborhoods. A curious blend of Federal dollars, voluntary associations, and private nonprofit corporations has molded a public-private neighborhood organization movement within many of the larger American cities. While churches, ethnic groups, and civic associations have long provided a basis for neighborhood organization in the large cities, the programs associated with President Johnson's "War on Poverty" in the 1960s made available substantial funds for community action programs, community development grants, and model city programs that were targeted for poorer neighborhoods. These programs often required the active participation of those who were affected.

Still another form of private organization has become an integral part of the American system of local government. In this case, officials belonging to local units of government or homeowners' associations form private associations to tend to their mutual interests. These vary from what are at times called "peak associations" to "professional associations." A peak association is one in which *top* officials from a number of similar organizations get together to discuss mutual concerns. In a "professional association," particular professional groups such as engineers, educators, police, administrators, and others meet to consider common problems. In some cases, an association of school superintendents, an association of irrigation districts, a league of cities, or a water users' association may function as both a peak and a professional association. Many are organized with a limited staff, but

they are as important in influencing the development of local public policies as any of the formal units of government.

Searching for Order in Complexity

Local government in the United States is characterized by a large number of units organized in regard to different concurrent communities of interest and performing various types of services. Many scholars criticize American local government for the presumed chaos engendered by this variety and diversity. But rather than be preoccupied with the crazy-quilt patterns that are revealed in maps of local governments, we need to look at how communities of people organize themselves through local government to realize their joint aspirations and provide for their joint needs.

As we undertake this inquiry, we need to recognize that problems abound in the organization of local governments. Government by its very nature involves opportunities for some to make decisions that impose deprivations upon others. Reliance upon the principle of majority rule, for example, necessarily implies that a majority can make decisions that are contrary to the interests of those who are in the minority. Furthermore, governments can make legitimate use of instruments of force or coercion to impose decisions upon individuals; those who form majority coalitions thus have the potential to exploit others to their own advantage. Government can be an ugly business where some can use extraordinary powers to oppress others.

While this potential danger exists, the powers of government are essential for the realization of the fundamental values of human communities. Organizing governments, thus, is like playing with fire. They can serve useful purposes necessary to human existence, but if not properly limited can also be destructive of human values.

In examining how the American people organize and make use of their system of local governments, it is important to be aware of the potentials for both good and evil in all instruments of government. The question, then, is what structure or combination of structures offers the best opportunities to realize joint advantage from the powers of government while keeping the dangers of exploitation and oppression to a minimum. Where authority is distributed so that each element of a community contributes to the common good, the different elements maintain a pattern of reciprocity with one another and thus are

encouraged to participate to each other's mutual advantage. Reciprocity is abandoned, however, when some—even when they are a majority—use their capabilities to exploit others. When reciprocity is abandoned, the spirit of cooperative participation in a joint venture is lost. Individuals become alienated and the sense of community erodes.

Constructive measures of collective action are maintained only so long as all elements of a community are left better-off as a result of their joint efforts. In such circumstances reciprocity and mutuality of interest can sustain a positive sense of community. The value of any system of local government thus depends upon how its different units are related to each other and how well they serve the interests of their citizens and constituents.

Local "Self-Government": Federalism and Constitutional Rule

A basic principle directly or indirectly applicable to all forms of government in the United States is that it is the "Right of the People" to "alter or abolish" any form of government that is destructive of the joint interest of communities of people and "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness" (U.S. Declaration of Independence). This is the basic principle of self-government, yet the inherent right of self-government at the local level has been subject to long debate. While it is generally recognized that that principle applies to the people of the United States as they are organized both as states and as a nation, the assertion of such a right among local communities has largely depended on the exercise of principles of self-government at the state level. Where home-rule charters have been authorized, citizens have an explicit right of local self-government: they can alter and abolish existing forms of government and institute new governments of their own choice. Otherwise, the right to alter their structure of local government can be exercised only indirectly through state constitutional decision-making processes and state legislative action.

The American system of local government does not exist in isolation from the more general system of American government. The principles of that general system still allow for the possibility of local self-government to exist side-by-side with a system of state governments and a Federal or national government. Those principles, when

operating concurrently, are known as federalism. Federalism, in turn, is made possible through the concept of constitutional rule.

Federalism has two connotations that blend into a single meaning. The older meaning derives from the Latin term *foedus*, which means to covenant. *Foedus* has the same meaning as the Hebrew term *b'rit*. Covenanting, in which people enter into an agreement with one another to govern their relationship on the basis of principles which are understood to be eternally true and thus in accordance with divine providence, stands in contrast to hierarchy, in which authority is derived from some preeminent authority that is presumed to have the ultimate say in the governance of society. The principle of covenanting is inherent in the American practice of constitutional choice: people enter into a covenant specifying the terms and conditions of government. The formulation of constitutions, then, was the way that Americans expressed their rights to institute new government at both the state and national levels following the American Revolution.

Federalism also refers to the creation of two or more units of government to exercise concurrent but limited authority to govern the same land and people. The representatives of the states thus covenanted together to form the government of the United States under the Articles of Confederation and then under the Constitution prepared at Philadelphia in 1787. Both the state and national governments derive their authority from people entering into a covenant specifying the terms and conditions of government. This principle of constitutional rule is articulated by a complex system of distributing and sharing authority so that all exercises of authority are limited (V. Ostrom, 1987). State governments are limited in their jurisdiction that might intrude upon national affairs, and the national government is limited in its jurisdiction so as to maintain the autonomy of each state over its own internal affairs. No single government is presumed to be competent to dominate the others.

Governmental authority is limited, first of all, through the specification of the constitutional rights of individuals. These relate to freedom of speech, press, and communication, which facilitate the maintenance of an open public realm of discussion and deliberation that is free from governmental domination; freedom of association, in which people retain a basic right to govern their own individual affairs; and rights of due process of law, which establish obligations on the part of governmental authorities to discharge their prerogatives in constitutionally proper ways.

The second mode of distributing and sharing the authority to govern involves the assignment of authority to separate decision structures responsible for legislative, executive, and judicial functions. Each assignment is subject to limits that enable one decision structure to veto or constrain the actions of the other decision structures. The general actions of government then depend upon the sharing of power by the separate decision structures. This separation of power, reinforced by checks and balances, is intended to prevent dominance by any single center of authority.

Finally, American constitutional arrangements typically make provision for the direct and indirect participation of citizens in the processes of government. Among state and local governments, citizens often participate in direct legislation through processes of initiative and referendum, popular approval of indebtednesses, and the recall of elected officials, and they can directly participate in judicial processes through service in both trial juries and grand juries. Indirectly, citizens can participate in legislative and executive structures by electing officials that serve in those capacities.

The enforceability of constitutional law is fundamental to the maintenance of a system in which all exercise of governmental authority is subject to limits. The joint exercise of legislative, executive, and judicial authority always implies a noncentral collaboration among independent authorities who coordinate their actions by reference to explicit or implicit standards of constitutional law. The national government is intended to prevail in matters that affect the several states in common, but the states are intended to be autonomous with reference to their own internal affairs so long as they continue to conform to basic constitutional principles. Thus, the American system of government relies extensively upon noncentralization of authority where relationships are coordinated by collaboration among co-equal authorities rather than the domination of a single center of preeminent authority. Elements of preeminence exist, but always within constraints.

The language of centralization and decentralization is often inappropriate to considerations of authority in the American system. For decentralization to occur, there must first be a centralization of authority. The American political system is better characterized as federalized rather than centralized. Yet there are elements of centralization that become manifest when state authority comes to dominate

over local affairs or when national authority comes to dominate over state and local affairs. These tendencies usually evoke substantial stress within the American political system, as struggles for dominance evoke struggles for reform. In each reform movement, consideration is given anew to the basic constitutional principles that apply to responsible and limited government.

Pressures toward centralization are usually met by a struggle for noncentralized accommodations, in which limits can be built into authority structures that still permit an autonomous exercise of an arm's-length relationship. Then it becomes meaningful to say "no," to specify limits to the proper exercise of authority, and to collaborate on the basis of mutually respectful and agreeable relationships. Decentralization, on the other hand, implies the acceptance of a subordinate relationship to preeminent authority where decentralized authority is still subject to central control. Any effort to decentralize can be easily aborted by the capacity of central authorities to recentralize.

Structures of government based upon principles of federalism and constitutional rule give rise to a continuous struggle for dominance and autonomy. There are some who seek to form coalitions to gain dominance over governmental structure and prevail over others, while others seek to reestablish an equilibrium among autonomous self-governing communities of interest. These conflicting tendencies create a fundamental tension that is an integral part of American society. Some see it as chaos; others see it as the way that human beings maintain an ordered but dynamic relationship with one another in a system of governance with no single center of preeminent authority.

The struggle for local self-government has been a part of this conflict throughout American history. At times, local autonomy has prevailed; at other times, state and national governments have asserted control. The patterns of local government existing at any point in time represent the current state of affairs. This leaves the precise nature of the American system of local government an open question. The tensions remain, and the struggle goes on without end.

Throughout their long-term struggle for self-government, Americans have at times borne the yoke of oppressive and tyrannical local governments, but the burdens of oppression have always evoked a struggle for reform. Each reform movement gives new consideration to the principles that apply to responsible and limited local self-government and how these principles can be appropriately articulated in commensurate structures. And as these reform movements have

succeeded, they often have been displaced by new ones preoccupied with different values based on unfounded assumptions or untested hypotheses about the structure of intergovernmental organization. As a result, reform movements have been so varied and many of the outcomes have been so unanticipated that local autonomy has often been seriously compromised.

The next three chapters are devoted to an overview of American efforts to form and reform their system of local government. Chapter 2 will focus upon the struggle for local self-government during the nineteenth century; Chapter 3 will consider twentieth-century reforms, which were more preoccupied with considerations of efficiency and economy; and chapter 4 will explore the contemporary controversy over metropolitan organization. Together the successes and failures of these reform movements have fashioned the American system of local government as we know it today.

Footnotes

1. The descriptive data in this chapter draw heavily on census material compiled by the Federal government. Census figures cannot be used indiscriminately; as will be addressed below, there are problems with the manner in which jurisdictions of local government are defined, and with the undercounting of some groups in American society—particularly minority and ethnic groups. However, as an accounting of the diversity of local units of government, the range of expenditures, and the distribution of the population, these figures are very useful. Throughout the chapter we will use data from the 1982 and 1987 *United States Census of Governments* compiled by the United States Bureau of the Census.

2. Cooperative housing financed through Federal funds does not vest title with individual owners until financial obligations under Federal law are discharged. This is at variance with all other forms of cooperative organization.

Bibliographical Note

For a general enumeration of different types of governments in the United States, see the 1982 and 1987 *United States Bureau of the Census, Census of Governments*. Most textbooks on state and local governments in the United States contain substantial descriptive information as to the formal types of local government. Discussions of quasi-governmental organizations are less widespread, even though these units are very important in providing a variety of services for citizens. Among the works dealing with activities in these systems are Robert Bish and Vincent Ostrom (1973) *Understanding Urban Government*; Robert Yin and Douglas Yates (1974) *Street-Level Governments: Assessing Decentralization and Urban Services*; Milton Kotler (1969) *Neighborhood Government: The Local Foundations of Political Life*; Howard Hallman (1974) *Neighborhood*

Government in a Metropolitan Setting; Robert Hawkins (1976) *Self Government by District*; and Robert Warren (1966) *Government in Metropolitan Regions: A Reappraisal of Fractionated Political Organization*.

On the concept of self-government as a pervasive element of American government with its origins in the Revolutionary period, see Morton White (1978) *The Philosophy of the American Revolution* and Vincent Ostrom (1987) *The Political Theory of a Compound Republic*.

Tocqueville's (1945) *Democracy in America* provides one of the best discussions of local government in the United States; chapter 5 in volume I is entirely devoted to the subject. But the whole analysis, especially in the latter half of volume I and most of volume II, is grounded in presuppositions about the essential place of local government in the American political system.

THEORY AND PRACTICE OF PUBLIC ADMINISTRATION IN THE PHILIPPINES

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are shown to be more efficient and effective. In this context, responsibility for certain governmental functions are transferred to the private sector. Certain government social amelioration programs, health, sanitation and education are contracted out to private enterprise. The concept of privatization is very broad and for purposes of decentralization, the term is made to apply only to private sector investment on support facilities for delivery to local communities of basic services like agricultural credit, shelter programs, health care and insurance, medical service, potable water supply, garbage collection, postal services, and road maintenance, among others. The decision to privatize these governmental functions considers the effects upon employment problems, quality of service and cost-benefit criterion. Partially relieving government of the burden of performing service functions by sub-letting these to the private sector will enable it to focus on other more important pressing concerns.

Issues involving non-performing assets of government, abolition of certain government-owned and controlled corporations (GOCC's), divestment and privatization restructuring, CARP financing and other economic dimensions and implications of privatization will be treated more extensively in the chapter on Public Enterprise and Economic Development Administration.

Finally, decentralization, implemented by use of the four aforementioned modes involves both the endogenous resources of government and the efforts of exogenous groups outside of government to operationalize the service functions of the polity. More than people empowerment and power distribution, it can be an instrument for implementing social justice and an agent of social transformation.

THE ADMINISTRATIVE STRUCTURE

The setting up of the administrative department is actually aggregating work units. This requires knowledge and understanding of what is to be done and deciding the group it will be part of. This task observes the principle of homogeneity. There is no single principle of effective departmentalization.[49] The four criteria for departmentalization - purpose, process, clientele and place are not exclusive of each other. It is possible that any one of the four considerations may be pre-eminent or dominant over the other three, but the construction of the secondary and tertiary divisions of work will eventually take cognizance of the roles of the other three. The four criteria are interdependent principles but with none of them singly used as the pattern for

determining priorities, since much depends upon expected outcomes at a given time and place.[50] Not all activities of government can be neatly aggregated under a single universal plan. Technological requirements, size of the entity, need for geographic dispersal and time constraints for service delivery, are some of the intervening variables to be considered.

If public administration is principally a social design and a problem-solving enterprise more than art or science, then the task of government would be to protect the interests of society, provide services to the clientele and resolve problems. To achieve these requires a bureaucracy with proactive orientation, capable of anticipating changing scenarios and acting on them; a bureaucracy able to influence and shape outcomes and committed to make socially beneficial decisions.[51]

What is Bureaucracy

Bureaucracy refers to the systematic organization of men and tasks into some kind of pattern that will facilitate the achievement of group effort.[52] It is a system with components which includes men, offices, authority and processes for translating "community action" into rationally ordered "social action".[53] Ideally, it is characterized by technical specialization. Technical skills and expertise require training and experience resulting in specialization which ultimately makes for proficiency and professionalized careership in government service. These optimize the possibility for carrying out administrative functions in accordance with "calculable rules" regardless of persons performing or affected by said functions. Administration then becomes *rational* and *depersonalized*. Rules take precedence over personal feelings and emotions. Because of objective standards, human irrationality is reduced to the minimum.

The type of bureaucratic structuring is, to a large extent, conditioned by the culture of society - its values, ideas and even institutions. All organizations, for this matter, are social institutions with a culture complex, where members play roles as influenced by patterned expectations defining the behavior of the role-players. Legitimacy of power exercise is important to a bureaucracy. This is what authority is all about. It is the right to exercise and exert influence and motivate others to do things as the organization or the leader so desires. Weber speaks of it as a relationship between persons and not an attribute of an individual. It is a form of social control which rests upon the willing compliance of subordinates. Authority arises not by virtue of the

formal organization but rather built in the course of social interaction and socialization process.

Three ideal types of authority have been identified by Weber and these have been construed as forms of domination. When applied to the bureaucratic model of organization, they refer to bases of leadership. (1) *Traditional authority* establishes legitimacy of rulership as arising from age-old practice handed down from generation to generation. (2) *Charismatic authority* rests upon the individual personality of the leader, his innate charm to inspire loyalty and devotion from others. (3) *Legal-rational authority* is established by rules, not necessarily inflexible but capable of being changed rationally as situations demand.

The Philippine bureaucracy, while established upon rational- legal foundations, has elements of the traditional and the charismatic as basis for legitimation. The indigenous is superimposed by the western Weberian model. Kinship ties and primary group interests prevail over formal legal relations. Sense of pity and sympathy, gratitude for whatever one has done for somebody in the past makes for dynamic relationship resulting in parochialism and personalism. These breed reciprocal ties, with kinship obligations overturning the principle of merit and fitness.

Respect for the traditional elite results in dependency and unquestioning obedience to leadership by tradition and charisma. Acceptance of the subordinate role of the traditionally established elites places premium upon authoritarianism which pressures subordinates in the bureaucracy to conform without question. This is a form of negative consent which shunt aside legal formularies and administrative rules. Our bureaucracy is apparently based upon reciprocity where the behavior of bureaucrats influence the social structure and the organizational relationship influences the behavior of bureaucrats. The positive implications are outweighed by the negative effects as shown by studies of the operations of the Philippine bureaucracy which reveals vulnerability to nepotism because of consanguinity, affinity and ritual kinship (compadrazgo); perpetuation of spoils bred by patronage and influence-peddling; apathetic reaction to bureaucratic misconduct; invention of scapegoats for administrative deficiencies and bureaucratic weaknesses; low regard for the merit system and lack of appreciation for dispatch and simplicity in government operations and even open disregard for legal regulations and established procedures.

PHILIPPINE ADMINISTRATIVE STRUCTURE

There is no constitutional nor statutory prescription as to the number of departments in the executive branch of the Philippine government. However, functional distribution of work and performance of functions by the executive have to be considered. Of course the control powers of the President under Section 17 of Article VII of the 1987 Philippine Constitution tasks him with the responsibility to faithfully carry out the mandate of the law and empowers him to finally decide the number of departments.

Policy Guidelines for Implementation

Certain policy guidelines are observed in organizing departments. Program planning and implementation must be in accordance with national policies. To ensure economy and efficiency, to minimize duplication and overlapping of activities, bureaus and offices of a department are grouped on the basis of major functions. There is decentralization of departmental functions in order to reduce red-tape, free national officials of administrative details and relieve them of routine and local matters. There is delegation of appropriate authority to subordinate officials with decision-making made at a level closest to the community clientele.[54]

Jurisdiction of the Department

The department possesses jurisdiction over bureaus, offices, regulatory agencies and government-owned and controlled corporations assigned to it by law. The administrative relationship of the department with the sub-units and agencies over which it possesses jurisdiction are of three categories:

a. *supervision and control* -

This refers to the authority to direct performance of duty; restrain the commission of acts; review, approve or modify acts and decisions of subordinate units and officials; prescribe standards, guidelines and programs and determine priorities in executing plans and programs.

b. *administrative supervision* -

Relates to the relationship between a regular department and regulatory agencies. It means overseeing the operations of these agencies to ensure efficient, effective and economical management provided there is no inter-

ference in the activities of the agency concerned. The department may require the agency to submit reports, conduct management audit, performance evaluation and inspection to determine compliance with policies, standards and guidelines set by the department. As a disciplinary measure and control mechanism, the department may take appropriate action to require performance of official functions, rectify violations and other abuses and similar kinds of maladministration.

Administrative supervision does not imply the authority to appoint or to perform personnel actions not in keeping with decentralization of personnel functions. While the department can review and pass upon the budget proposals of the agency, it may not increase such budget. It has no authority over contracts entered into by the agency because appropriate laws, rules and regulations govern review of such contracts. It does not possess the power to review, revise, reverse or modify agency decisions in the exercise of regulatory or quasi-judicial functions.[55] The overseer role of the department is rendered meaningless since the regulatory agency is left almost free, independent and autonomous in its actions and decisions over crucial issues requiring some kind of check or control.

c. *attachment*

This term applies to the lateral relationship between a department and the attached agency or corporation for policy and program coordination. The department is entitled to have a representative in the corporate board of the agency. The agency is required to come up with a periodic report on the status of its programs and projects. Through the departmental representative, general policies are outlined for the agency to guide its internal policies. Internal operations are a matter of internal concern for the agency.

An audited financial statement is submitted by the agency or corporation to the Secretary of the department to which it is attached within sixty days after the close of the fiscal year. The budget for the previous fiscal year continues to be the basis of the expenditure of the corporation until such time that its financial statement for that fiscal year is received by the department secretary. Once the government corporation incurs an operational deficit at the close of the fiscal year, it will be put under the administrative supervision of the department and its operating and capital budget will be subject to examination, review, modification and approval of the department.[56]

While supervision and control powers are exercised by the department, sufficient initiative and freedom of action are encouraged by giving the bureaus and offices reasonable opportunity to decide before control is exercised by the department. For those functions involving discretion, experienced judgment and expertise, departmental control may be exercised only as provided for by the law vesting such functions in the subordinate agency.

Authority Delegation

To implement plans and programs effectively, authority over and responsibility for operations may be delegated to bureau directors and regional directors. The extent of such delegation is circumscribed by the need for economy, efficiency and effective implementation of national and local programs in accordance with policies and standards developed by the department. The regional and field offices are the operating arms of the bureaus. As counterparts of the bureaus in the regions, they are directly responsible to the bureau director for the operations they undertake.

THE DEPARTMENTS OF GOVERNMENT*

There are two hundred sixty eight (268) agencies composed of twenty-one (21) administrative departments, one hundred nine (109) attached entities and one hundred thirty nine (139) other agencies.[57] These are grouped into eleven sectors based upon mission or purpose, overall programs and specific plans and functions of the agencies concerned.

1. GENERAL GOVERNMENT SECTOR

The agencies involved in the development and maintenance of an organization structure supportive of general governmental administration include the Department of Budget and Management, Department of Finance, Department of Foreign Affairs, the National Economic Development Authority and the Office of the Press Secretary.

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*The powers, functions and responsibilities of the departments and component units are based on the provisions of the Administrative Code of 1987, Agency Profile and Program Targets FY 1992, pertinent executive orders and other issuances of the President, Cabinet Resolutions and departmental orders.

Department of Budget and Management

The two basic concerns of this department have to do with budget functions and control and management services. Two constituent units are responsible for budget functions and control - (1) *The Budget Operations Office* reviews and analyzes budgetary proposals of national and local government agencies and corporations; sees to it that these entities comply with budgetary policies and project priorities; determines budgetary implications of foreign-assisted projects, and implements fiscal policies for budget preparation and control. There are four bureaus to perform the above enumerated functions: National Government Budget Bureau A & B; Local Government Budget Bureau; Budget Planning Bureau; Foreign Assisted Projects Bureau. (2) *National Accounting and Finance Office* takes charge of the maintenance of the data bank for the financial information of fiscal agencies and international financial institutions; analyzes and evaluates accounts and overall financial performance of government; supervises and manages the accounts of government agencies and instrumentalities. These functions are the responsibility of three bureaus, namely, the National Government Accounting and Finance Bureau, Local Government Accounting and Finance Bureau, and the Government Corporate Accounting and Finance Bureau.

The management services components are the responsibility of the Department of Budget and Management. These are provided for by the *Systems and Procedures Bureau, Organization and Productivity Bureau* and the *Compensation and Position Classification Bureau.* Support services are provided by the Legislative, Administrative and Procurement Services and the Financial and Computer Services.

Department of Foreign Affairs

The Department of Foreign Affairs is the lead agency assisting the President in the field of foreign relations guided by the paramount considerations of national sovereignty, territorial integrity and the right to self determination. Its powers and functions include the conduct of relations with other states, negotiate treaties and other agreements as authorized by the President in coordination with other appropriate government agencies; promote trade investments, tourism and economic relations; foster cultural relations and enhance the positive image of the Philippines abroad; protects and assists Philippine nationals abroad; perform legal documentation functions

and provide information about events in other countries which have a bearing upon Philippine national interest.

The Department of Foreign Affairs consists of the Home Office and the Foreign Service establishments. The home offices include line/operational units which are organized to take charge of the different geographic areas of the world like the Office of Asean Affairs, Office of Asian and Pacific Affairs; Office of American Affairs, Office of European Affairs, and Office of Middle Eastern and African Affairs. There are service offices and councils assisting the line units. The Foreign Service Institute, the Board of Foreign Service Examiners and the Board of Foreign Service Administration which take charge of administering qualifying examinations for career foreign service officers.

Attached to the Home Office are the Law of the Sea Secretariat, the Inter-Agency Technical Committee on Economic, Scientific and Technical Cooperation with Socialist Countries (SOCOM), the Inter-Agency Technical Committee on Technical Cooperation Among Developing Countries (IATC-TCDC), Permanent Inter- Agency Technical Committee on ESCAP Matters (PITCEM).

The Philippine foreign service consists of fifty-two (52) diplomatic missions composed of fifty embassies and two United Nations missions; one hundred three (103) consular posts with two consular establishments headed by honorary consular officers. Personnel from other government agencies assigned to the foreign service establishments include attaches for trade and industry, labor and employment, national defense, tourism, agriculture; officers from the Philippine National Bank, Bureau of Internal Revenue, Commission on Filipinos Overseas and the Commission on Audit.

Department of Finance

This department is mandated to ensure sound and efficient generation and management of the fiscal and financial resources of government. It reviews, approves and manages all public sector debt, local and foreign, to ensure that borrowed funds are effectively used and obligations promptly serviced by government. Because of the scarcity of domestic resources to finance projects and programs envisioned in the Mid-Term Philippine Development Plan for 1987-1992, and because of the need to minimize dependency on foreign borrowings, the department seeks to strengthen government capacity to generate its own financial resources.

It supervises revenue operations of local governments to make them less dependent upon national government funding. It makes use of different types of sourcing like revenues and operations, foreign and domestic borrowing, and sale or privatization of assets. Supervision of revenue collection, custody and management of government financial resources, debt negotiation, servicing and restructuring are also the concern of this department.

Five major working groups have been set up to take care of the above-mentioned commitments: *Policy Development and Management Services Group, Revenue Operations Group,* with the Bureau of Internal Revenue and Bureau of Customs as major components; the *Corporate Affairs Group* to oversee the operations of government corporations and financial institutions and the assets privatization office; the *Domestic Finance Group* with the Bureau of Treasury as the principal custodian of funds and manager of the cash resources of government; the Bureau of Local Government Finance which oversees local government revenue administration and fund management, including sourcing, collection mechanisms, credit utilization, local taxation and real property assessment. The *International Finance Group* assists in the formulation of policy guidelines for borrowing, international financial negotiations of new loans, debt rescheduling, ensures implementation of foreign funded projects and compliance with debt repayment obligations.

2. AGRICULTURE, AGRARIAN REFORM AND ENVIRONMENT SECTOR

Three government departments are involved in the basic concerns of this sector to achieve growth that is geographically dispersed and demographically equitable. These are the *Department of Agriculture, Department of Agrarian Reform* and the *Department of Environment and Natural Resources.* The components of this sector aim at providing the mechanisms for the allocation of the wealth of the nation, provide employment and income, ensure access to natural resources through sound environmental management policy.

Department of Agrarian Reform

The Department of Agrarian Reform coordinates the national reform program designed to transform farm tenants and lessees into owner-cultivators; provides leadership in the development of support services to tenant-farmers, farm managers and other cultivators; assists the financing,

production, marketing and other aspects of farm management. Its line bureaus are the *Bureau of Agrarian Legal Assistance* for the resolution of agrarian disputes and problems and representation of agrarian reform beneficiaries regarding cases arising from agrarian disputes; the *Bureau of Land Development* which makes survey reports for the production of soil maps, draws up programs for agricultural development and guidelines for the conversion of private agricultural lands to non-agricultural use; reviews specifications and cost estimates of land development projects; the Bureau of Land Tenure Development for developing policies and procedures for acquisition and distribution of public and private agricultural lands; sets standards for land valuation and compensation schemes for agrarian reform areas; identification and inventory of tillers, landowners and landholdings; review and evaluation of documents for the registration and issuance of Emancipation Patents and Titles.

The *Bureau of Agrarian Reform Beneficiaries Development* formulates policies and guidelines for the development of agrarian reform areas into agro-industrial estates; encourage growth of cooperative system of production, processing, marketing, credit and services; development and management of resettlement areas and landed estates; serves as liaison between the Department of Agrarian Reform and agrarian reform beneficiary organizations and establishes linkages with agencies involved in farm support services. The *Bureau of Agrarian Reform Information Education* provides policy guidance for effective and continuing information, education and promotional activities; conducts and coordinates training and education programs for enhancing farmer participation and provide functional assistance on farmer education.

There are staff units for management and executive services, legal and public assistance, research and planning, finance, physical assets management, personnel and administrative services. The agencies attached to the department are the Land Bank of the Philippines, Agricultural Credit Administration, and the Agrarian Reform Coordinating Council.

Department of Agriculture

The promotion of agricultural growth and development is the primary concern of this department. In pursuit of this goal, its efforts are dedicated to the uplift of the quality of life especially of the small farmers and fishermen and other rural workers. It envisions sustainable resource productivity, a progressive rural economy with dynamic agro-industrial country-side com-

munities. This country-side development thrust implements the principle of social justice enshrined in the constitution.

Its line bureaus are the *Bureau of Animal Industry* for the development and expansion of livestock, poultry and dairy industries. Quality standards in the manufacture and sale of livestock, poultry and allied industries are prescribed by this bureau. *The Bureau of Plant Industry* aims at producing improved plant materials, protection of agricultural crops from pests and other plant diseases; development and improvement of farm equipment and structures related to plant industry; formulation of policies regarding plant quarantine, prevention, control and eradication of pests. *The Bureau of Fisheries and Aquatic Resources* is responsible for the management, development and proper utilization of fishery and aquatic resources and undertakes studies on the economics of the fishing industry. The *Bureau of Soils and Water Management* renders assistance on matters related to the utilization and management of soils and water which includes water resource utilization, soil conservation, impounding and prevention of erosion, fertility preservation, and rain- making projects for watersheds and agricultural areas during prolonged droughts. The *Bureau of Agricultural Research* undertakes researches and establishes linkages with research institutions, especially state colleges and universities. The *Agricultural Training Institute* trains agricultural extension workers and their clientele and communicates research results to farmers and fishermen through appropriate training and extension activities.

There are support services for policy and planning. Regional offices are set to provide frontline services to the clientele. Implementation and monitoring of its programs at the provincial level is the responsibility of the Provincial Agriculture and Fisheries Officer; for the municipal and barangay level that of the Municipal Agriculture and Fisheries Officer.

The attached agencies include the Philippine Coconut Authority, the National Food Authority, the Councils for Agricultural Credit Policy, Livestock Development, National Agricultural Fishery, National Nutrition and the Philippine Administrative and Technical Committee for Southeast Asia Fisheries Development Culture (SEAFDEC).

Department of Environment and Natural Resources

The Department of Environment and Natural Resources is the primary agency of government for the sustainable development of natural resources

and ecosystems. Its task includes sustainable development of forest resources, optimal utilization of lands and minerals, efficient and socially equitable use of resources, and effective environmental management. It implements the mandate of the constitution to conserve and develop the natural resources of the nation. This department plays a significant role in addressing the issues of resource depletion, environmental degradation, inequitable distribution and allocation of lands and natural resources; upland poverty and continuous influx of lowland migrants, tenurial problems in the public domain, rationalization of forest-based industries and small scale mining.

Its line units are organized on the basis of purpose just like the other departments of government. The *Forest Management Bureau* aims at the effective protection, development and conservation of forest lands, watershed areas, grazing-lands and mangroves. It reforests and rehabilitates critically denuded and degraded forests, develops water resources and national parks, preserves wilderness and game refuges, wildlife sanctuaries and ancestral lands; propagate industrial tree plantations, tree and agro-forest farms like rattan, bamboo and other non-timber products. The *Land Management Bureau* manages alienable and disposable lands in the public domain and reclaimed lands, commercial and industrial and urban properties which are not within the responsibility of other government agencies. Its dispositive functions may be in the form of leasehold, direct sale and issuance of patents. The *Mines and Geo-Sciences Bureau* provides assistance to the mining sector in the development of applicable technologies in geological surveys and assessment of mineral resources, laboratory services for geological, metallurgical, chemical and rock mechanics and assists in the conduct of marine geological and geophysical exploration drillings. It enforces mining laws to ensure compliance with safety standards for mining operations. The *Environmental Management Bureau* is concerned with the environmental quality standards for land, air, water, noise and radiation. Assessment of the environmental impact of projects to ensure proper disposal of solid and other toxic and hazardous wastes are enforced by this bureau. Industrial establishments are required to comply with these standards which constitute the basis for the issuance of the Environmental Compliance Certificate (ECC). Non-compliance means imposition of fines and penalties. The *Ecosystems Research and Development Bureau* is engaged in integrated research in the Philippine ecosystems and natural resources aimed at developing the technologies supportive of its thrust. The *Protected Areas and Wildlife Bureau* is committed to the conservation of

wildlife and other protected areas like national parks, wildlife sanctuaries and other sensitive environmental areas.

The agencies attached to the Department of Environment and Natural Resources are the Population Adjudication Board, the National Mapping and Resource Information Authority, the Natural Resources Development Corporation and the National Electrification Administration.

3. TRADE AND INDUSTRY SECTOR

Two departments are involved in the task of reconciling the process of industrialization with the economic, social and political processes-Tourism and Trade and Industry.

Department of Tourism

The Department of Tourism is the agency for the promotion of tourism as a major socio-economic activity for generating foreign currency and employment; spread tourism benefits to a wider segment of the population; assure safe, convenient and enjoyable stay and travel of local and foreign tourists. Its line bureaus to implement these mandates are the Bureau of *International Tourism Promotion*, the *Bureau of Domestic Tourism Promotion*, *Bureau of Tourism Information* and the *Office of Tourism Standards*. Assisting the line bureaus to carry out these mandates are a number of service units like the Office of Tourism, *Office of Development Planning* and *Tourism* Coordination.

Department of Trade and Industry

This department is mandated to coordinate, promote and regulate trade, industry and investment activities. It is committed to intensify private sector activity and sustain economic growth through a socially responsible liberalization and deregulation program and a comprehensive growth strategy. While it aims at protecting Filipino enterprises against foreign competition and trade practices, one wonders how this protection can be achieved by a deregulated and a liberalized trade policy rather than import control.

The five working groups of this department are *Industry and Investments*, *International Trade*, *Policy Planning and Special Concerns*, *Administrative and Technical Services*, and *Regional Development*. Under the Industry and Investments Group are the Board of Investments; Bonded

Export Marketing Board; Construction Industry Authority of the Philippines; Council for Investments; and the Export Processing Zone Authority. Under the International Trade Group are the Bureau of Export Trade Promotion; Foreign Trade Service Corps; Bureau of International Trade Relations, Center for International Trade Expositions and Missions; Garments and Textile Export Board; Philippine International Trading Corporation; International Coffee Organization-Certifying Agency; Philippine Shipping Council; Philippine Trade Training Center. The entities under the Administrative and Technical Services Group are the Bureau of Patents, Trademarks and Technology Transfer; Financial Management Service; Office of Legal Affairs and the General Administrative Services. The entities under Policy, Planning and Special Concerns, are the Bureau of Import Services; Cottage Industry Technology Center; Center for Labor Relations Assistance; Construction Manpower Development Foundation; Management Information Service; National Manpower Training Council; Office of Operational Planning and Office of Special Concerns. The support bureaus of the Regional Development Group are the Bureau of Domestic Trade Promotion; Bureau of Trade Regulation and Consumer Protection; Bureau of Product Standards; Bureau of Small and Medium-Business Development.

4. INFRASTRUCTURE AND ENERGY SECTOR

The goods and services provided by this sector include infrastructure, power, transportation and communication. These provide the physical foundation for the economy to operate efficiently. Three departments carry out these responsibilities.

Department of Public Works and Highways

The *Department of Public Works and Highways* is the engineering and construction arm of the nation. It plans, designs and maintains and operates infrastructure facilities like national highways, flood control, water resources development systems and other public works. Its technical bureaus include the *Bureau of Design; Bureau of Construction; Bureau of Maintenance; Bureau of Equipment and Bureau of Research and Standards.*

Most of the field operations responsibilities of the department are implemented by the regional offices set up in the different geographic regions of the country, the district offices and the engineering offices of city govern-

ments. There is a Project Management Office responsible for local and foreign-assisted projects.

Department of Transportation and Communication

The *Department of Transportation and Communication* is responsible for the promotion, development and regulation of dependable and coordinated networks of transportation and communication and postal services. These services are needed to enhance mobility and coordination of the constituent sector of the nation. Its line offices include *Land Transportation Office; Air Transportation Office; Telecommunications Office* and *Postal Services Office.*

There is the *Land Transportation Franchising and Regulatory Board* with quasi-judicial powers with respect to land transportation. It prescribes and regulates routes and zones of operation of public land transportation services. It is responsible for the issuance of Certificates of Public Convenience or permits for the operation of public land transportation.

A number of agencies and corporations are attached to this department like the Metro Manila Transit Corporation; Philippine National Railways; Light Railway Transit Authority; Philippine Aerospace Development Corporation; Civil Aeronautics Board; Philippine Ports Authority; the National Telecommunications Commission, and the Maritime Industry Authority.

Department of Energy

This is the most recent department of government created by virtue of Republic Act 7638, otherwise known as the Department of Energy Act of 1992, approved December 9, 1992. This department is charged with the responsibility for carrying out programs related to energy supply for the requirements of the country. It aims at pursuing a policy of intensive exploration, production, management and development of indigenous energy resources; encourage participation of the private sector in energy resource development; integrate and coordinate governmental policies to achieve self-sufficiency and enhance energy and power productivity while maintaining the ecological balance of the environment. Because of our dependence upon energy and because of the uncertainty of oil prices and the controversy over the use of the Bataan Nuclear Power Plant, government needs to tap other energy sources. This department therefore advises the President and the Cabinet on policies concerning energy.

The organic act creating this department mandates that after a four-year period from its effectivity, there shall be instituted a program de-regulating energy projects and activities. A timetable for implementing this policy shall be set up in keeping with the privatization policy of the state. Four operating bureaus are responsible for effectively discharging said powers and functions, with the assistance of two support services.

The *Energy Resource Development Bureau* is responsible for formulating and implementing policies for developing and increasing domestic supply of local energy sources lie fossil fuels, nuclear fuels and geothermal resources, formulating programs and plans for exploration, development and extraction of local energy resources; provide consultative training and advisory services to practitioners and institutions engaged in such activities; and provide policy guidelines relative to the operations of service contractors.

The *Energy Utilization Management* Bureau is responsible for the formulation and implementation of policies relative to economic transformation, conversion, processing, marketing and storage of petroleum, coal, natural gas, geothermal and other non-conventional energy resources like wind, solar, biomas, among others; monitor sectoral energy consumption; audit energy management advisory services and technology application projects on energy utilization; formulation of an integrated rural energy program and an operational plan for fuel, oil and energy source allocation in the event of critically low energy supply. It coordinates with the Department of Environment and Natural Resources on matters regarding environmental standards and develops middle and long-term energy technology development strategies in cooperation with the Department of Science and Techno logy.

The *Energy Industry Administration Bureau* assists in the formulation of regulatory policies and set standards for the operations of government and private sector entities involved in energy resource supply activities, whether conventional or non-conventional. It formulates policies, guidelines and requirments relative to the operations of oil companies, dealers of petroleum products, coal importing and distributing companies, natural gas distributing companies, power producers and other suppliers of conventional energy.

The *Energy Planning and Monitoring Bureau* assists in the development and updating short, medium and long-term energy plans; assesses demand and supply options, including the impact of energy policies upon the economy, the environment and quality of life of the people; reviews programs

and plans for power development, local energy source development and production and energy importation; reviews and analyzes current patterns of energy consumption in relation of economic growth and development performance; guarantees the restoration, protection, and enhancement of the quality of the environment, public health and safety.

Among the attached agencies are the Philippine National Oil Company, the National Power Corporation and the National Electrification Administration.

5. EDUCATION, CULTURE AND MANPOWER DEVELOPMENT SECTOR

Two departments implement the goals and programs of this sector, the Department of Education, Culture and Sports and the Department of Labor and Employment.

Department of Education, Culture and Sports

The *Department of Education, Culture and Sports* formulates, implements and coordinates policies, programs and projects in the field of formal and non-formal education at all levels. It supervises public and private educational institutions; establishes and maintains an integrated system of education relevant to the goals of national development. The goal of education and manpower development sector is to develop individual potentials for productivity and self actualization in order to contribute to social development.

The functional bureaus are for elementary education, secondary education, technical and vocational education, tertiary or higher education, non-formal education, physical education and school sports. Regional offices in the administrative regions have been set up to oversee the school divisions and the school districts. Several agencies like the National Museum, National Library, Instructional Materials Corporation, the Institute of Philippine Languages, the National Historical Institute, among others, are attached to it since their functions are related.

Department of Labor and Employment

As policy-making entity and coordinator in the area of labor and employment, the Department of Labor and Employment is responsible for promoting

gainful employment opportunities and optimizing the development and utilization of the Philippine labor force. It implements labor and social legislation and regulates relations between worker and employer.

These responsibilities are undertaken by the following operational bureaus - *Labor Relations, Local Employment, Women and Young Workers, Rural Workers and Working Conditions*. Attached to the department are the National Wages Council; the Philippine Overseas Employment Administration; the National Power and Youth Council and the Employees Compensation Commission, among others.

6. HEALTH AND SOCIAL WELFARE SECTOR

The efficient operation of the economy rests upon provision of health, housing and other social services. Performance of these fulfills not only the humanitarian functions but also reinforces the collective effort to pursue development goals.

Department of Health

The primary function of this department includes the promotion, protection, preservation and restoration of the health of the people through delivery of health services and goods. These functions are performed by three line offices. The *Office for Public Health Services* takes charge of maternal and child health, tuberculosis control, family planning, environmental health, nutrition, dental health, malaria control, schistosomiasis control of non-communicable and communicable diseases. The *Office for Hospitals and Facilities Services* is responsible for hospital operations and management, radiation health, hospital maintenance and health infrastructure. The *Office for Standards and Regulations* has three bureaus and one national office to formulate and enforce regulatory policies and standards over the various areas of health. The *Bureau of Research and Laboratories,* sets up policies for the establishment, accreditation and licensing of laboratories, blood banks and entities handling biological products. The *Bureau of Food and Drugs* prescribes general standards and guidelines to check on the veracity of nutritional and medicinal claims of products being advertised; enforces rules and regulations pertaining to food, drugs, cosmetics, traditional medicine and household products. The *Bureau of Licensing and Regulation* licenses and regulates hospitals, clinics and other health facilities; sets standards to be used for inspection and licensing. The *National Quarantine Office* formulates and implements quarantine laws and regulations through

its field offices; supervises rat-proof zones in international airports, and conduct examination of aliens for immigration purposes.

It has regional offices, as well as provincial, district and city health offices to provide for the health needs of the clientele communities. The entities attached to it are the Philippine Medical Care Commission and the Dangerous Drugs Board. The Philippine Heart Center, Lung Center of the Philippines, Philippine Childrens' Medical Center and the Kidney Institute are corporations also attached to it.

Department of Social Welfare and Development

The mission of this department is to protect and rehabilitate the physically and mentally disabled and the socially disadvantaged to restore them to effective social functioning and participation in community affairs. The goal is to assure their well-being and liberate the poor from deprivation.

Its functional units are the *Bureau of Emergency Assistance* for relief and rehabilitation of victims of natural calamities and social disorganization, including cultural communities and other distressed and displaced persons. The *Bureau of Family and Community Welfare* gives assistance to socially disadvantaged families and communities including family planning and outreach programs. The *Bureau of Disabled Persons Welfare* is engaged in disability prevention and rehabilitation of the physically, mentally and socially disabled. The *Bureau of Women's Welfare* gives special attention to the prevention and eradication of all forms of exploitation of women like illegal recruitment and prostitution. The *Bureau of Child and Youth Welfare* takes care of the abandoned, abused, neglected and exploited children, delinquents, offenders, street children, and victims of prostitution.

It has welfare facilities like centers for drug abuse, street children, youth, with special needs, reception and study and homes for the aged and the unwed mothers. The Population Commission, Council for the Welfare of Children, National Nutrition Council and the National Council for Disabled Persons are attached to it for functional coordination.

7. DEFENSE SECTOR

To guarantee the sovereignty of the Republic of the Philippines, its territorial integrity and the security of its people, three entities have been

established - the Department of National Defense, the National IntelligenceCoordinating Agency and the National Security Council.

The *Department of National Defense* provides security, stability, peace and order needed for economic growth and development. The concept of national security encompasses not only politico-military but also socio-economic strength. This maximization of its role in socio-economic development parallels its traditional role of securing the country against external and internal threats.

The entities under its supervision and control are the *Government Arsenal* for the manufacture of munitions for the military establishment and mobilization of civilian industry to augment its production capacity in times of emergency; the *Office of Civilian Defense* for coordinating the various entities of the national government, private institutions and civic organizations for the protection of the civilian population and property in times of war or national emergency. The *Philippine Veterans Affairs Office* administers the benefits to veterans and their beneficiaries; provides medical care and treatment; assistance to widows and dependents and retired military personnel. The *Armed Forces of the Philippines* upholds the sovereignty of the state, supports the constitution, defends the territory and provide national security. Its three major service commands are the Philippine Army, Philippine Navy and the Philippine Air Force. The *National Defense College of the Philippines* develops national defense and civilian leaders and selected private executives for effective participation in the formulation of national policies. The *Veterans Memorial Center* provides medical and dental care to veterans and their dependents.

8. SCIENCE AND TECHNOLOGY SECTOR

Science and technology are crucial to industrialization. In the Philippines, the thrust is discovery and development of indigenous technologies and adoption of the foreign to the local environment. The government supports self-reliant scientific and technological capabilities needed for the productive systems of the country in the context of developmental goals. It encourages public and private enterprise sector partnership and initiative in science and technology and enjoins the private sector to undertake greater role in research and development efforts.

The *Department of Science and Technology* has five Sectoral Planning Councils for formulating policies and programs and strategies for science

and technology development and monitoring research projects. *The Philippine Council for Industry and Energy Research and Development* for industry, energy and mineral resources; the *Philippine Council for Agriculture, Forestry and Natural Resources* for agriculture and forestry resources; the *Philippine Council for Health Research and Development* for health; the *Philippine Council for Aquatic and Marine Research and Development* for aquatic and marine resources; and the *Philippine Council for Advanced Science and Technology Research and Development* for advanced science and technology.

There are eleven research institutes under it - Industrial Technology Development; Philippine Nuclear Research; Forest Products Research and Development; Food Nutrition Research; Philippine Textile Research; Advanced Science and Technology; Science Education; Science and Technology Information; Technology Application and Promotion; Philippine Atmospheric, Geophysical and Astronomical Services Administration, and the Philippine Volcanology and Seismology Institute.

The National Academy of Science and Technology and the National Research Council of the Philippines are component scientific bodies under it.

9. PUBLIC ORDER AND SAFETY SECTOR

The state provides a mechanism to ensure a just and humane society under the rule of law and a regime of justice, freedom, love, equality and peace. Deprivation of live, liberty and property may be done only after due exhaustion of the due process of law clause of the constitution. There is the guarantee of equal protection of the law. These functions are carried out by the Department of Justice and the Judiciary. In as much as the concern of this chapter is administrative organization and structure, only the Department of Justice will be discussed.

The *Department of Justice* is the legal counsel and prosecuting arm of government. It maintains a just and orderly society through effective, speedy and compassionate administration of justice. The ten operational units under it are the *Government Corporate Counsel* to provide legal services to the national government and its functionaries and the government-owned and government-controlled corporations; the *National Bureau of Investigation* (NBI) for the detection, investigation and prosecution of crimes; the *Public Attorney's Office* to extend free legal assistance, representation of indigents

and poor litigants in criminal cases and in non-commercial civil disputes; the *Board of Pardons and Parole* to conserve and redeem human resources by granting parole, recommending pardon, probation and other forms of executive clemency to qualified convicts and accords humane treatment to prisoners; the *Bureau of Corrections* for the rehabilitation of prisoners; the *Parole and Probation Administration* for managing the parole and probation system and supervising all parolees and probationers.

The *Land Registration Authority* preserves and safeguards the integrity of land titles through proper registration and other legal documents. The *Bureau of Immigration* provides immigration and naturalization regulatory services and implements laws governing citizenship, admission and stay of aliens. The *Commission on the Settlement of Land Problems* investigates and arbitrates untitled land disputes involving small land owners and those of indigenous cultural communities. The *Office of the Solicitor General* is an independent and autonomous office attached to the department to act as the law firm of the Republic of the Philippines. It prosecutes and defends government actions and policies, including those of public officers when sued in the exercise of their official duties.

There is an *Office of the Chief Prosecutor* to assist in the performance of powers and functions of the department relative to the role of prosecution arm of government. Its counterpart on the provincial level is the Provincial Prosecution Office and the City Prosecution Office in the case of cities.

10. LOCAL GOVERNMENT SECTOR

The local autonomy thrust has resulted in a responsive and accountable local government structure instituted through decentralization. Correspondingly, powers and revenues have been allocated to local government units and given just share in national taxes and equitable share in the proceeds of natural resources. Community empowerment forms part of this mandate.

Department of Interior and Local Government

. This department is responsible for performing the above- mentioned mandated functions. Its operational line units are the Bureau of Fire Protection for the improvement and integration of fire prevention and suppression services and the coordination of the activities of fire operation centers; the *Bureau of Jail Management and Penology* for providing security to prisoners

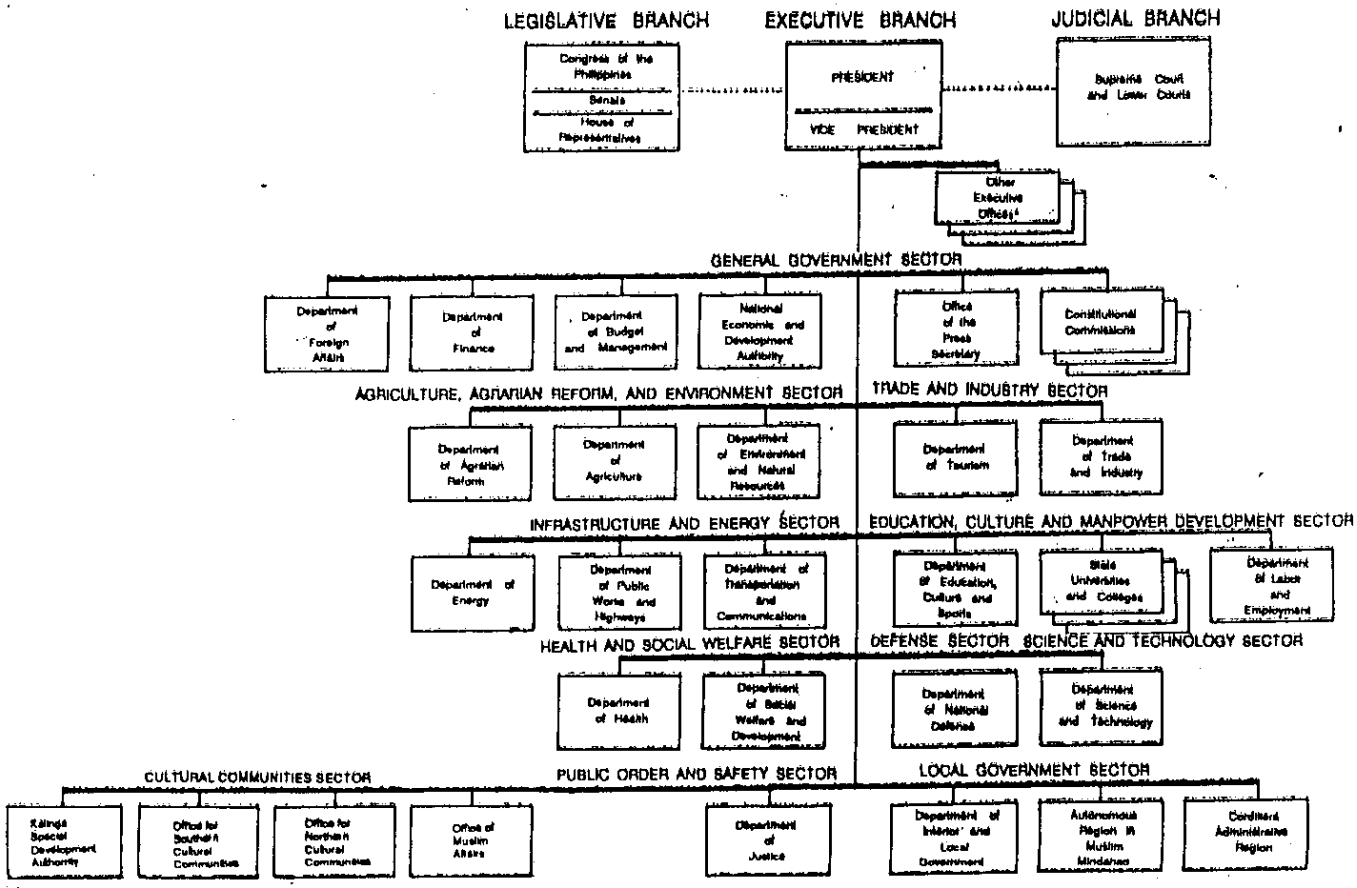
and promoting their spiritual, social and moral well-being; the *Philippine National Police* for coordinating an directing activities of police units. These activities are coordinated by the department through the National Police Commission. The *Local Government Bureau* provides guidance to local units through issuance of policy and program guidelines and standards; encourages community and citizen participation in the political and social development of the barangays. There is a *Local Government Academy* for the training of local government officials to enhance their technical capabilities and prepare them to effectively handle their duties and responsibilities under an autonomous local government set-up. Lately, there has been established a *Philippine Public Safety College* to train local government employees to meet emergencies arising from natural and man-made disasters. Regional offices have been established in the administrative regions to assist local units in the performance of their functions.

11. CULTURAL COMMUNITIES SECTOR

National programs of government consider the rights of indigenous cultural communities in order to preserve their culture, traditions and institutions. While the majority of the population are Christians, the smaller ethnic and religious groups are also entitled to democratic space. Structures have been set up for the protection of their rights and well-being.

The *Kalinga Special Development Authority* aims to hasten the growth and development of Kalinga to enable the inhabitants to actively participate in the task of national development. The *Office of Muslim Affairs* aims to preserve the culture, traditions and institutions of Muslim Filipinos with due regard for national unity. There are bureaus established to cover the areas of Muslim settlement, cultural affairs, cooperatives development, pilgrimage and endowment, and external affairs; The *Office for Northern Cultural Communities* for the preservation of the traditions and institutions of the northern cultural communities; the *Office for Southern Cultural Communities* for the preservation of the traditions and institutions of the southern cultural communities with due regard for national unity and development. This sector is primarily concerned with the improvement of the quality of life, social and economic well-being of the non-christian segment of the inhabitants and integrate them into the mainstream of Philippine society.

NATIONAL GOVERNMENT



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[56]Ibid.

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The Constitution of India

with Selective Comments
by

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PART XI

RELATIONS BETWEEN THE UNION AND THE STATES

CHAPTER I—LEGISLATIVE RELATIONS

Distribution of Legislative Powers

245. Extent of laws made by Parliament and by the Legislatures of States—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Notes on Article 245

Legislative powers of Parliament and State Legislatures: Limitations

Legislative power under the Indian Constitution is subject to the following limitations:

(*a*) The federal scheme of distribution of legislative powers.

(*b*) Fundamental rights and other provisions of the Constitution, as to what laws can be passed.

(*c*) Constitutional provisions as to prior sanction or subsequent approval of the President in respect of certain Bills.

(*d*) The rule that a State Legislature cannot legislative extra-territorially—though Parliament does not suffer from this limitation, by virtue of article 245(2).

(*e*) The doctrine that the Legislature cannot delegate matters of policy.

(*f*) The doctrine that the legislation must not be a fraud on the Constitution.

(*g*) The doctrine that the legislature must make a 'law'. Its function is not adjudicatory nor executive, but only legislative.

Limitation (a) above flows from article 246.

Limitation (b) above flows from articles 12 and 13.

Limitation (c) above flows (i) from the general doctrine that all authority and power must be exercised in conformity with the Constitution and (ii) from the words 'Subject to the provisions of this Constitution' in article 245(1).

Limitation (d) above flows from the words 'for the whole or any of the State' in article 245(1) (as regards State Legislatures).

(*i*) *State of Bihar* v. *Charusila*, A.I.R. 1959 S.C. 1002.

(*ii*) *Tata Iron & Steel Co.* v. *State of Bihar*, A.I.R. 1958 S.C. 452.

Limitation (e) above flows from the general principle that power given to a body by the Constitution must, in its essentials, be exercised by that body only.

Limitation (f) flows from another general principle that all constitutional and statutory powers must be exercised for the purpose for which they are intended. This aspect has been discussed exhaustively in *D.C. Wadhwa* v. *Union of India*, A.I.R. 1987 S.C. 579. See also *Poona Municipality* v. *Dattatraya*, A.I.R. 1965 S.C. 555.

Limitation (g) above flows from interpretation of the word 'law' occurring in article 245(1), which confers the power to make 'laws'. On this point, see the undermentioned cases:

(*i*) *Basanta* v. *Emp.*, A.I.R. 1944 F.C. 86.

(*ii*) *Indira* v. *Rajnarain*, A.I.R. 1975 S.C. 2299.

(*iii*) *Mishri Lal* v. *State of Orissa*, A.I.R. 1977 S.C. 1686.

(iv) *Government of A.P.* v. *H.M.T.*, A.I.R. 1975 S.C. 2037.
(v) *City of Ahmedabad* v. *New Sherrock Spinning*, A.I.R. 1970 S.C. 129.
(vi) *Tirath Ram* v. *State of U.P.*, A.I.R. 1973 S.C. 405.

Malafides

Under the unamended Income Tax Act, 1961 the legislature had already classified Income Tax Officer into two grades and given power to Government to appoint and sanction their appointments. The amendment of 1987 redesignated these posts and made certain other provisions. It was held that it can hardly be argued that the amended Act was passed *male fide* to destroy the cause of action in the present petitions. This is apart from the fact that no legislation can be challenged on the ground that it is *male fide*. "*Hundraj Kanyalal Sajnani* v. *Union of India*, AIR 1990 SC 1106.

Legislation on Essential Commodities

Our legislation relating to essential commodities illustrates the position what is an essential commodity has to be determined not merely from the terms of the Essential Commodities Act, 1955, but also with reference to s. 2(a)(xi) read with notifications issued thereunder from time to time. Section 2(a)(xi) provides as under:

"Any other class of commodity which the Central Government may, by notified order, declare to be an essential commodity for the purposes of this Act, being a commodity with respect to which Parliament has power to make laws by virtue of Entry 33 in List III in the Seventh Schedule of the Constitution".

Thus, for determining the scope of the Act, one has to refer to the entry in the Constitution relating to the subject. Now, the Constitution, in the Concurrent List, Entry 33, provides as under:

"Trade and Commerce in, and the production, supply and distribution of,—

(*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products."

It may further be mentioned that s. 2 of the Industries (Development and Regulation) Act, 1951 declares that it is expedient in the public interest that the Union should take under its control the commodities specified in the schedule to the Act, which includes cement. On this basis the Delhi High Court in *Trans Yamuna Cement Dealers Association* v. *L. Governor of Delhi* (1988) 21 Reports (Delhi) 537 has held that the Delhi Cement and Licensing and Control Order, 1982 is valid.

246. Subject-matter of laws made by Parliament and by the Legislatures of States—(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1) the Legislature of any State [1][***] also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State [1][***] has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

1. The words and letters "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [1][in a State] notwithstanding that such matter is a matter enumerated in the State List.

Notes on Article 246

Doctrine of pith and substance

In no field of constitutional law is the comparative approach more useful than in regard to the doctrine of pith and substance. This is a doctrine which has come to be established in India and derives its genesis from the approach adopted by the courts (including the Privy Council) in dealing with controversies arising in other federations. Briefly stated, what the doctrine means is this. Where the question arises of determining whether a particular law relates to a particular subject mentioned in one list or another, the court looks to the substance of the matter. Thus, if the substance falls within Union List, then the incidental encroachment by the law on the State List does not make it invalid. This principle had come to be established by the Privy Council when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. In India, the doctrine came to be established in the pre-independence period under the Government of India Act, 1935. The classical example is the *Privy Council judgment in Prafulla* v. *Bank of Commerce*, A.I.R. 1946 P.C. 60, holding that a State law dealing with money lending (a State subject) is not invalid merely because it incidentally affects promissory notes (Union List, entry 46). The doctrine is sometimes expressed in terms of ascertaining the true character of legislation and it is also emphasised that the name given by the Legislature to the legislation in the short title is immaterial. Again, for applying pith and substance doctrine, regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions.

Undermentioned decisions illustrate the above proposition:-

(*i*) *Southern Pharmaceuticals* v. *State of Kerala*, A.I.R. 1981 S.C. 1865, para 15 (incidental encroachment to be disregarded).

(*ii*) *Prem* v. *Chhabra*, (1984) 2 S.C.C. 302, para 8.

(iii) *State of Rajasthan* v. *Chawla*, A.I.R. 1959 S.C. 544, 547.

(*iv*) *Amar Singh* v. *State of Rajasthan*, (1955) 2 S.C.R. 803 (extent of invasion immaterial).

(*v*) *D.C.G.M.* v. *Union of India*, A.I.R. 1983 S.C. 937, para 33 (incidental encroachment immaterial).

Co-operative Society

Under State list entry 32, legislation can be passed for providing for nomination by Government of the Chairman and members of the Committee of Management of cooperative societies. It is open to the State to legislate on any or all aspects of cooperative societies including their managements. *Sheetal Prasad Gupta* v. *State*, AIR 1990 Pat. at page 81 paragraph 24 (FB) (April,May).

Entry of goods

State Legislature cannot levy taxes on the entry of goods into local areas which are not meant for consumption, use or sale therein. If in the exercise of its authority, the State legislature uses wide words, such words are construed in such a manner that it is held that the State Legislature had intended to restrict those words and phrases in their meaning within the parameters of the competence of the State Legislature. The State legislature cannot empower municipal committees to levy tax, only on the entry of goods within the local areas, when those goods are not meant for consumption, sale or use within that area. *Indian Oil Corporation* v. *Municipal Corporation*, AIR 1990 P&H 99 (April).

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1. Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch., for "in Part A or Part B of the First Schedule".

Mines

Union list entry 54 reads "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". Such a law was passed in 1957 - The Mines and Minerals (Regulation and Development) Act, 1957. The Act of 1957 covers all mineral oils, including minor minerals. Legislative competence under State list entry 23 is subject to such declaration. State list entry 23 reads - "Regulation of mines and mineral development, subject to the provisions of List I with respect to regulation and development under the control of the Union". Any legislation by the State after such declaration by Parliament is unconstitutional, because that field is abstracted from the legislative competence of the State Legislature. *Nanganayaka* v. *State of Karnataka*, AIR 1990 Kant 97, 103, 104 para 10-13.

Baijnath v. *State of Bihar*, AIR 1970 SC 1436, 1443, 1444, 1445 (reviews case law).

State of Tamil Nadu v. *Hind Stones*, AIR 1981 SC 711.

Stamp duties

Article 25(b) of the Bombay Stamp Act, 1958 (as amended in 1985), which levies stamp duty on documents of transfer of shares in cooperative societies, falls within: concurrent list, entry 44 (Stamp duties - but not including rates of stamp duty) and State list entry 63 (Rates of Stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. It is therefore within the competence of the State legislature. In any case the Act has received the assent of the President and its validity cannot be questioned.

Hanuman Vitamin Foods v. *State*, *AIR 1990 Bom 204*, 207, 208 para 5, 6 (DB) (July) following *Bar Council of UP* v. *State of UP*, AIR 1973 SC 231 para 12.

egislative list

Entries in the legislative lists are to be construed according to pith and substance. Bombay Money-Lenders Act, 1946 is enacted under the State list, entry relating to "Money-lending, money lenders and relief of agricultural indebtedness". It does not fall within Union list, entry 46 (Bills of Exchange etc.). *Bhanuchankar* v. *Kamal Tara Bineders*, A.I.R. 1990 Bom. 140, 141 (DB) (May).

As observed by the *Supreme Court in Ujagar Prints* v. *Union of India*, A.I.R. 1989 S.C. 516, para 23 :-

"Entries in the legislative lists, it may be recalled, are not sources of the legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression with respect to article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the test is whether the legislation looked at as a whole is substantially with respect to the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."

247. Power of Parliament to provide for the establishment of certain additional courts—Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

248. Residuary powers of legislation—(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those list.

249. Power of Parliament to legislate with respect to a matter in the State in the national interest.—(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

250. Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.—(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

251. Inconsistency between laws made by Parliament under articles 249 and 250, and laws made by the Legislatures of States.—Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.—(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to

that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterward by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) An Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

253. Legislation for giving effect to international agreements—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States—(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provisions of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State [1][***] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Notes on Article 254

The operation of article 254 is not complex. The real problem that in practice arises is the problem of determining whether a particular State law is repugnant to a Central Act. A number of judicial decisions (noted below) give guidance as to when repugnancy arises. The important rulings are:

(*i*) *Zaverbhai* v. *State of Bombay*, A.I.R. 1954 S.C. 752.
(*ii*) *Tika Ramji* v. *State of U.P.* (1956) S.C.R. 393.
(*iii*) *Municipal Corporation* v. *Shiv Shankar*, A.I.R. 1971 S.C. 815.
(*iv*) *Karunanidhi* v. *Union of India*, A.I.R. 1979 S.C. 898.
(*v*) *Western Coalfields* v. *Special Area Development*, A.I.R. 1982 S.C. 697.
(vi) *Raghubir* v. *State of Haryana*, A.I.R. 1981 S.C. 2037.

1. The words and letters "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

Union and State Legislation

The scheme of distribution of legislative powers under the Indian Constitution - such distribution being a necessary component of a federal political structure - raises interesting issues where the co-existence of central and State laws in a particular area give rise to litigation. Such problem arises either because the Union or a State may illegally encroach upon the province of the other parallel legislature or it may arise because though there is no encroachment as such on each other's sphere, yet, the two laws clash with each other. The two situations are, strictly speaking, different from each other and they must be judged by two different tests. Where the subject matter of the legislation in question falls within either the Union List or the State List only, the question is to be decided with reference to legislative competence. One of the two laws must necessarily be void because leaving aside matters in the Concurrent List, the Indian Constitution confers exclusive jurisdiction upon Parliament for matters in the Union List and upon a State Legislature for matters in the State List. The correct doctrine applicable is that of ultra vires. Reference under article 143, A.I.R. 1965 S.C. 745, 762.

The above is a case of exclusive jurisdiction and since one of the two laws must be void, the question of inconsistency between the two has no application. Only one law will survive and other law will not survive. In contrast, where the legislation passed by the Union and the State is on a subject matter included in the Concurrent List, then the matter cannot be determined by applying the test of *ultra vires* because the hypothesis is that both the laws are constitutionally valid. In such a case, the test to be adopted will be that of repugnancy under article 254(2). It follows that it is only where the legislation is on *a matter* in the Concurrent List that it would be relevant o apply the test of repugnancy. Notwithstanding the contrary view expressed by some authors, this is the correct position. Such a view was expressed by Dr. D. Basu in his Commentary on the Constitution of India (1950), page 564 and it is this view that has been upheld by the Supreme Court in the undermentioned decisions :-

(*i*) *Deep Chand* v. *State of U.P.*, A.I.R. 1959 S.C. 648;
(*ii*) *Premnath* v. *State of J&K*, A.I.R. 1959 S.C. 749;
(*iii*) *Ukha* v. *State of Maharashtra*, A.I.R. 1963 S.C. 1531, para 20;
(*iv*) *Bar Council* v. *State of U.P.*, A.I.R. 1973 S.C. 231, 238;
(*v*) *Barai* v. *Henry*, A.I.R. 1983 S.C. 150, para 15;
(*vi*) *Hoechst* v. *State of Bihar*, A.I.R. 1983 S.C. 1020, paras 68, 69, 76;
(*vii*) *L.T.C.* v. *Karnataka*, (1985) Supp. S.C.C. 476, para 29;
(*viii*) *Lingappa* v. *State of Maharashtra*, A.I.R. 1985 S.C. 389, para 26.

Legal practitioners, Repugnance

Section 48(8) of the Karnataka Land Reforms Act, 1961 (as amended in 1974) prohibited the legal practitioners from appearing in proceedings before Land Tribunals. This was held to be repugnant to section 30 of the Advocates Act, 1961 and section 14 of the Bar Council's Act, 1926. The Supreme Court held that Union List Entries 77 and 78 are concerned with persons entitled to practise before the Supreme Court and High Court and these entries have been construed in *O.N.Mohanti* v. *Bar Council of India*, AIR 1968 SC 888 as applied in *Jaswant Kaur* v. *State of Haryana*, AIR 1977 Punjab and Haryana 221 as regulating all aspects of the rights of advocates. *Srinivas Raghavachar* v. *State of Karnataka*, (1987) 2 SCC 692.

255. Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only—No Act of Parliament or of the Legislature of a State,[1]*** and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

1. The words and letters "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

(*a*) where the recommendation required was that of the Governor, either by the Governor or by the President;

(*b*) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(*c*) where the recommendation or previous sanction required was that of the President, by the President.

Notes on article 255

Neither the Legislature nor the President has the power to declare that non-compliance with article 255 of the Constitution was of no effect. *Utkal C. & J.* v. *Sate of Orissa*, A.I.R. 1987 S.C. 2310. By giving his assent to a subsequent Bill, the President cannot validate, with retrospective effect an earlier Act which had failed for want of the President's assent under article 255 so as to validate acts done under the invalid statute, because it would amount to a declaration that non-compliance with article 255 was of no consequence, which is a declaration beyond the competence of the President, *Abdul* v. *State of Kerala*, A.I.R. S.C. 182.

CHAPTER II—ADMINISTRATIVE RELATIONS

General

256. Obligation of States and the Union—The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may, appear to the Government of India to be necessary for that purpose.

257. Control of the Union over State in certain cases—(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under-clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be

determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

[1]**257A.** [*Assistance to States by deployment of armed forces or other forces of the Union.*] *Rep. by the Constitution (Forty-fourth Amendment) Act*, 1978, s. 33 (w.e.f. 20-6-1979).

258. Power of the Union to confer powers, etc., on States in certain cases—(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State of officers and authorities thereof.

(3) Where by virtue of this article power and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

[2][**258A. Power of the States to entrust functions to the Union**—Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the exclusive power of the State extends.]

259. [*Armed Forces in States in Part B of the First Schedule.*] *Rep. by the Constitution (Seventh Amendment) Act*, 1956, s. 29 and Sch.

260. Jurisdiction of the Union in relation to territories outside India—The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, and law relating to the exercise of foreign jurisdiction for the time being in force.

261. Public acts, records and judicial proceedings—(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and every State.

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1. Ins. by the Constitution (Forty-second Amendment) Act, 1976, s. 43 (w.e.f. 3-1-1977).
2. Ins. by the Constitution (Seventh Amendment) Act, 1956, s. 18.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

Disputes Relating to Waters

262. Adjudication of disputes relating to waters of inter-State river or river valleys—(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Notes on Article 262

The Inter State Water Disputes Act, 1956, (33 of 1956) is legislation passed under article 262 of the Constitution. Section 11 of the Act excludes the jurisdiction of the Supreme Court in respect of a water dispute referred to the Tribunal. But the Supreme Court can direct the Central Government to fulfil its statutory obligation under section 4 of the Act, which is mandatory, particularly when the State of Tamil Nadu supported the writ petition filed for the purpose by a registered society.

Tamil Nadu C.N.V.V.N. UP Sangam v. *Union of India*, 1990 SC 1316 (July).

Co-ordination Between States

263. Provisions with respect to an inter-State Council—If at any time it appears to the President that the public interest would be served by the establishment of a Council charged with the duty of—

(*a*) inquiring into and advising upon dispute which may have arisen between States;

(*b*) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or

(*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject;

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

อ.ก.พ.วิสามัญเฉพาะกิจเกี่ยวกับการศึกษาเพื่อปรับปรุงการจัดระเบียบบริหารราชการแผ่นดิน

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1. นายเกษม สุวรรณกุล	ประธาน อ.ก.พ.
2. นายกระมล ทองธรรมชาติ	อ.ก.พ.
3. หม่อมราชวงศ์ จัตุมงคล โสณกุล	อ.ก.พ.
4. นางทิพาวดี เมฆสวรรค์	อ.ก.พ.
5. นายบุญเลิศ ไพรินทร์	อ.ก.พ.
6. นายไพโรจน์ พรหมสาส์น	อ.ก.พ.
7. นายมหิดล จันทรางกูล	อ.ก.พ.
8. นายวิจารณ์ พานิช	อ.ก.พ.
9. นายวิรัตน์ วัฒนศิริธรรม	อ.ก.พ.
10. นายวิลาศ สิงหวิสัย	อ.ก.พ.
11. นายวิษณุ เครืองาม	อ.ก.พ.
12. นายศุภชัย ยาวะประภาษ	อ.ก.พ.
13. นายสมบัติ จันทรวงศ์	อ.ก.พ.
14. นายสาโรจน์ ชวนะวิรัช	อ.ก.พ.
15. นายสุรพล นิติไกรพจน์	อ.ก.พ.
16. นายเอนก สิทธิประศาสน์	อ.ก.พ.
17. นายอุดล บุญประกอบ	อ.ก.พ.
18. ผู้อำนวยการสำนักพัฒนาโครงสร้างส่วนราชการและอัตรากำลัง สำนักงาน ก.พ. (นายวีระ ไชยธรรม)	อ.ก.พ. และเลขานุการ
19. เจ้าหน้าที่วิเคราะห์งานบุคคล 9 สำนักพัฒนาโครงสร้างส่วนราชการและอัตรากำลัง สำนักงาน ก.พ. (นายธำรง พงษ์สวัสดิ์)	ผู้ช่วยเลขานุการ
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