



A Practical Guide to

Constitution Building:

Decentralized Forms of Government

Markus Böckenförde

This paper appears as chapter 7 of International IDEA's publication *A Practical Guide to Constitution Building*. The full Guide is available in PDF and as an e-book at <http://www.idea.int> and includes an introductory chapter (chapter 1) and chapters on principles and cross-cutting themes in constitution building (chapter 2), building a culture of human rights (chapter 3), and constitution building and the design of the executive branch, the legislature and the judiciary (chapters 4, 5 and 6).



International IDEA resources on Constitution Building

A Practical Guide to Constitution Building: Decentralized Forms of Government

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Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still belies constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance, what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today, after the legacy of the 1990s, is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,
former President of Mauritius*

Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen
Secretary-General, International IDEA

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Acronyms and abbreviations

ASEAN	Association of Southeast Asian Nations
AU	African Union
EEC	European Economic Community
EU	European Union
NAFTA	North American Free Trade Agreement
UK	United Kingdom
USA	United States of America
WTO	World Trade Organization

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Decentralized Forms of Government

1. The aim of this chapter and an overview

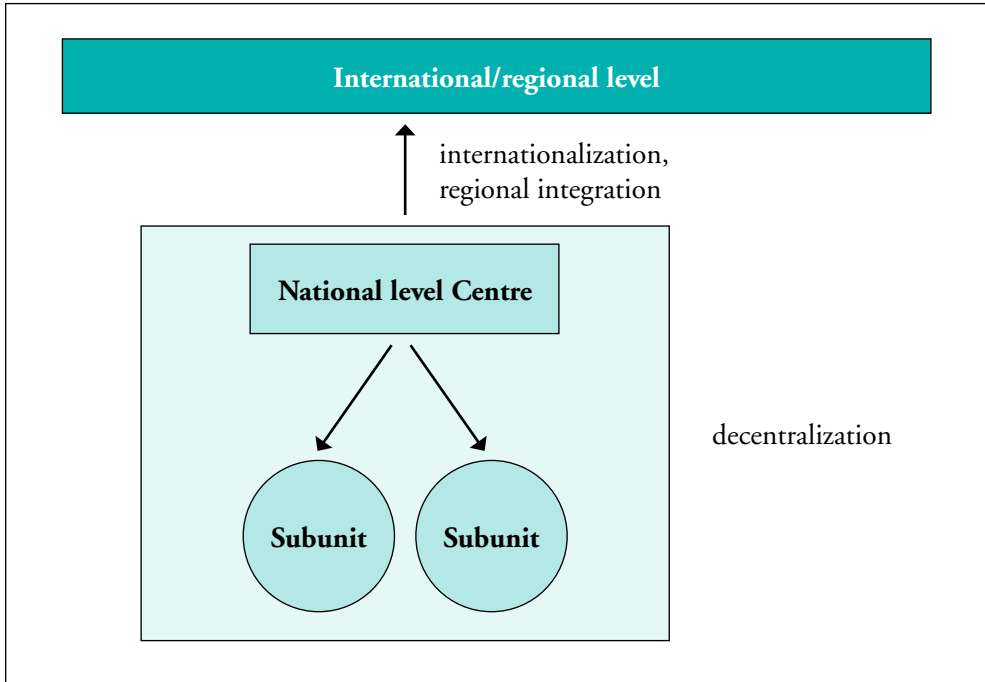
1.1. What is decentralization?

The term ‘decentralization’ can capture a variety of phenomena. Political actors, stakeholders and multilateral institutions have considered decentralization a solution to the problems of many countries—particularly in post-conflict settings. Consequently, various concepts have become associated with the term ‘decentralization’, and some experts have further conflated it with other meanings. This confusion complicates the task of analysing and applying the concept of decentralization in the context of constitution building.

This chapter and the International IDEA Guide—*A Practical Guide to Constitution Building*—more generally understand ‘decentralization’ as a generic term for the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government¹ or levels of administration.² Decentralization is thereby understood as a territorial concept. Authorities and powers are allocated to regional, provincial or local levels (see figure 1).

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Figure 1. The transfer of powers upwards to an international or regional institution



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

Decentralization is a two-way street. Experts use the term mainly to describe the transfer of power and authority from the national level to *provincial* or *local* levels of government within a country, but decentralization also might occur through the transfer of powers upwards from the national level to an *international* or *regional*^B institution. The latter form of ‘upward’ decentralization is often referred to as ‘regional integration’

or ‘internationalization’ of certain powers. Although the transfer of authority to international bodies implies elements of shifting central powers, this chapter focuses on aspects of decentralization *within* a country and addresses only briefly the effects of ‘upward decentralization’ and its relevance for constitutional practitioners (see box 1).

Decentralization’ is a generic term for the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration.

Box 1. Regional integration and internationalization

Decentralization not only provides the opportunity to disperse power within a country; it also allows the transfer of power and authority to an international or regional level. In most international or regional treaties, upon ratification, countries commit themselves to implement explicitly-stated international or

regional requirements through mechanisms and institutions which are adopted nationally. However, other international treaties also establish free-standing international or regional institutions that exercise certain functions that member countries have transferred to them (the African Union (AU), Association of South-east Asian Nations (ASEAN), North American Free Trade Agreement (NAFTA), East African Community, League of Arab States, etc.). Some international or regional institutions might even evolve into quasi-governmental settings over time. Over the last few decades, the European Union (EU) has gained continuously greater power and authority from its member states, a transfer that has created a supranational government with executive, legislative and judicial authority. Historically, a continuous process of ‘upward’ decentralization created countries such as Switzerland, the United Arab Emirates and the United States.

‘Internationalization’ and ‘regional integration’ will probably exert only indirect and remote influence when a new constitution is being negotiated and drafted: generally, subsequent governments and parliaments—rather than the constitutional assembly—will consider signing and ratifying international agreements that transfer power to supranational bodies. However, as the case of Spain illustrates, the two issues may have to be addressed at the same time: after the death of General Francisco Franco, constitution builders in 1975–8 had to consider the potential constitutional requirements for joining the European Economic Community (EEC) after filing an application for membership in 1976.

Beyond regional integration, the issue retains salience for constitution builders at a universal level as well. The criteria for accession to the World Trade Organization (WTO) or the Rome Statute of the International Criminal Court, for instance, require that members adopt a particular constitutional structure. To comply with some requirements of the Rome Statute as well as EU integration, Germany had to adjust provisions of its Constitution concerning the extradition of German nationals. Article 16(2)* of the Basic Law now reads: ‘No German may be extradited to a foreign country. A different regulation providing for the extradition to a member state of the European Union or to an international court of law may be made as long as the fundamental principles of a state governed by law are observed.’ More generally, several constitutions now include provisions that explicitly authorize a shift in sovereignty to international institutions (e.g. articles 23 and 24 of the Constitution of Germany;** Article 7 of the Constitution of Singapore;*** Article 70 of the Constitution of the Central African Republic (2004); Article 2(A) of the Constitution of Hungary****).

Aside from considering future opportunities for ‘internationalization’ and ‘regional integration’ while drafting the constitution, constitution builders must also acknowledge powers already transferred to international or regional bodies. In post-conflict settings (after the end of a civil war) or in other contexts of decisive change (e.g. the transition to democracy), according to international law, constitution builders and new governments must abide by international

obligations previously entered into. Drafters must therefore understand particular treaty obligations that will continue to bind the new government.

* *Grundgesetz* [Basic Law] of the Federal Republic of Germany (1949) as of 2010.

** Ibid.

*** Constitution of the Republic of Singapore (1965) as of 2008.

**** Constitution of the Republic of Hungary (1949) as of 2007.

Decentralization can involve two facets: first, assigning sub-national levels of government elements of ‘self-rule’ by which they obtain the authority to regulate and/or run certain functions or services on their own (e.g. health care, primary education, etc.); and, second, by establishing a system of ‘shared rule’, allowing sub-national entities to be involved in national rule making, often through a second chamber at the national legislature or by providing a list of ‘concurrent powers’ that allows various levels of government to regulate a specific area together. Often, both facets are part of a decentralization scheme.

1.2. Objectives of decentralization

While the motivation for decentralization will often vary from state to state, the following two sets of objectives are the most prevalent:

- to design efficient service delivery based on the principle of subsidiarity: services that can be effectively provided by lower levels of government should fall in their responsibility; to distribute public power broadly so as to achieve more effective and responsive government; to broaden access to government services and economic resources; and to encourage greater public participation in government; and
- to construct a government structure in which diverse groups can live together peacefully; and to allow stakeholders representing a minority or marginalized regions to identify their space in the system, thereby underpinning the stability of the state by persuading them to remain loyal.

The objectives that apply in the particular context will often influence the design of decentralization efforts. Textbooks suggest that transferring responsibilities from the national to the *local* level of government can improve service delivery and accountability, whereas transferring authority to the *regional*, *provincial* or *state* level might best accommodate ethnic diversity. However, especially in post-conflict societies, caution

and prudence should apply in designing the appropriate form of decentralization in order to avoid reverse effects: weak local structures and lack of skilled human resources may produce an incompetent and corrupt local government, whereas ill-tailored ethnic decentralization may fuel secessionist movements even more.

One objective of decentralization can be to construct a government structure in which diverse groups can live together peacefully and to allow stakeholders representing a minority or marginalized regions to identify their space in the system.

This chapter offers a menu of options for decentralization to facilitate the search and negotiations for the appropriate design for decentralization. Decentralization is not a priority for every political actor. Some political stakeholders in the process of constitution building may aspire to concentrate power at the centre. Controlling the state usually provides access to economic power since the state—especially in developing and transitional countries—represents the predominant concentration of capital. Thus, power brokers often compete hard to control the state apparatus at the expense of delivering local or regional services efficiently. Indeed, constant marginalization of the periphery is one cause of internal conflicts.

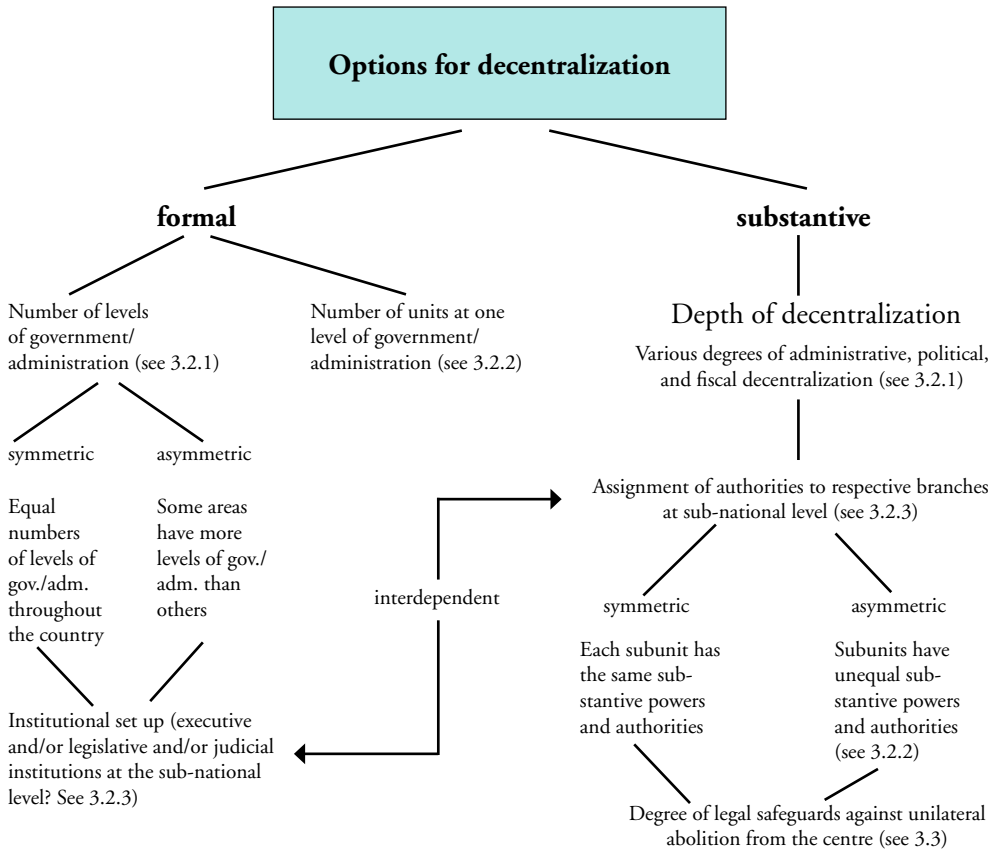
A second set of challenges arise from attempts to adopt state symbols rooted in the religion, identity or traditions of one particular community or ethnicity. Such provocative gestures permit rulers to strengthen their power base but alienate other communities in the process. Neutral symbols or a strong commitment to anti-discrimination laws will have the opposite effect but might not inspire the desired loyalty among supporters or citizens more generally.⁴

1.3. Components and aspects of decentralization

A pure form of centralized government concentrates powers and resources from both a territorial and a functional perspective. A purely centralized government hardly exists—with the possible exception of the Vatican State and other micro-states. Once the central government creates substructures or shifts any powers or resources to existing substructures, a form of decentralization occurs. Decentralization comes in many forms, offering numerous options for meeting different challenges. A wide variety of models exist to meet the two sets of objectives addressed above, each often containing a formal and a substantive component. The chapter discusses those issues as laid out in figure 2.

Decentralization takes many forms. A wide variety of models exist, each often containing a formal and a substantive component.

Figure 2. Options for decentralization



The formal component of decentralization (sometimes referred to as ‘geographic decentralization’) addresses the structure of government by determining both the levels of government, from local to national, and the number of subunits within each level of government (see the left-hand column in figure 2). In other words, it answers the following set of questions. How many levels of government or levels of administration should the country have? (See section 3.1.1.) Within one level of government or administration, how many units should it entail (for example, how many regions should be established at the regional level)? (See section 3.1.2.)

The formal component of decentralization addresses the structure of government by determining both the levels of government, from local to national, and the number of subunits within each level of government, as well as the actual institutional set-up in the units. These are interdependent.

Either inquiry can identify asymmetric structures, which means that some levels of government or administration might not exist throughout the country, but only in some parts of the country. The next, more specific, task is about the actual institutional set-up in the units: should there be an executive/administrative branch of

government only, implementing national policies, or should there also be a legislature, enacting regional policies, or even a judiciary adjudicating on regional law? (See section 3.2.3.)

Previous agreements and historical events can determine the applicable territorial and governmental structure. However, particularly after violent conflict or internal crisis, constitution builders can reconfigure that structure to reflect new substantive deals or reforms. Examples include Germany after World War II and South Africa after the apartheid regime.

The substantive component of decentralization (see the right-hand column of figure 2) measures how the formal structure is actually filled with substantive authorities (sometimes referred to as ‘functional decentralization’). What actual powers are assigned to the lower levels of government? Some countries may have a similar formal structure, but differ considerably with regard to the powers and competences assigned to the various levels (often referred to as the ‘depth of decentralization’).

The depth of decentralization varies across systems on a continuum, from those characterized as centralized to those considered strongly decentralized. Distinguishing between the following three aspects of decentralization greatly assists in measuring its cumulative degree—administrative decentralization, political decentralization, and fiscal decentralization (see section 3.2.1). How deep does a country intend decentralization to go?

The substantive component of decentralization measures how the formal structure is actually filled with substantive powers—the depth of decentralization. It can be measured by considering three aspects: administrative, political and fiscal decentralization.

Although the formal *structure* of decentralization will hardly determine its depth, it narrows the substantive options of decentralization. As indicated by the arrow in figure 2, the formal structure and actual substantive power are interdependent: the allocation of far-reaching powers at lower levels of government requires an adequate institutional setting in the first place. If, for example, the formal structure does not provide for an elected legislature at the sub-national level, substantive legislative powers cannot be assigned to that level. Thus, the creation of separate branches of government—an executive, a legislature or a judiciary—at the sub-national level will influence the depth of decentralization by any measure (see section 3.2).

The overall viability of decentralization depends not only on the structure and depth of dispersal but also on whether constitution builders legally safeguard dispersal against unilateral revocation by the national centre (see section 3.3). At this stage, the term ‘federalism’ is introduced as a specific form

The overall viability of decentralization depends not only on the structure and depth of dispersal but also on whether there are legal safeguards against unilateral revocation by the national centre.

of decentralization. Probably the most specific characteristic of a federal structure is the legal safeguard it provides for the subunits—a legal framework that the national centre cannot amend easily at the expense of the subunits, and a legal watchdog—most commonly the judiciary—to enforce any constitutional bargain on decentralization. Thus, a constitutional structure delineating a federal legal relationship between the different levels of government can support any constitutional bargain against unilateral changes by the centre.

2. Context matters

Experts can point to various means by which decentralization can be designed to resolve challenges in conflict-prone countries. However, specific national and regional contexts can have adverse impacts and can neutralize the positive effects of decentralization on conflicts (see table 1). Empirical studies underscore that, whereas some countries have successfully settled a previous conflict by introducing decentralization, others have failed, occasionally falling into deeper conflict. Identifying the proper form and design of decentralization may be one of the most challenging tasks for constitution builders. Success depends not only on the individual characteristics of a country and conflict. It might also turn on the power brokers involved and their commitment to building a nation. Contentious issues can differ depending on the level of decentralization. While transferring authority to the *regional*, *state* or *provincial* level typically involves a struggle over controlling and balancing power, decentralizing authority to *local* governments more often concerns service delivery.

The political culture can impede decentralization, particularly when it values the idea of final authority—whether for certain governmental institutions or for the ‘nation’ as such. The perception that all law must apply uniformly to everyone regardless of the subject matter can further complicate the decentralization process, as can the assumption that citizens owe loyalty only to the central state. Self-interest on the part of political leaders can exacerbate such problems. To achieve effective decentralization, leaders at each level of government must commit themselves to the concept, particularly the national leaders, who must relinquish power and authority. The political leaders of minority or regional groups can exchange the struggle against the state—which might even include a desire for secession—for an opportunity to participate peacefully and constructively in governing the state, albeit at a sub-national level.

Decentralization can be designed to resolve challenges in conflict-prone countries, but the national or regional context can have adverse impacts. Some countries have successfully settled a conflict by introducing decentralization, while others have failed.

As table 1 illustrates, the positive effects of decentralization can turn negative if constitution builders ignore context or fail to commit themselves to decentralization.

Table 1. The positive and negative effects of decentralization

Positive: decentralizing power can assist in:	Negative: decentralizing power might cause:
<p><i>... limiting authoritarianism at the national level.</i> Some forms of decentralization require power sharing, thereby diffusing power vertically.</p>	<p><i>... the strengthening of local elites who could misuse power.</i> Powerful interests can misuse the community or local government for private interests. Corruption is hard to eradicate at the level of small and potentially inefficient local governments.</p>
<p><i>... increasing responsiveness to the needs and preferences of the people.</i> Local communities are more likely to respond to local needs.</p>	<p><i>... ineffectiveness due to deficient human and financial resources.</i> Communities can be too small and overwhelmed to fulfil their functions properly because they do not have sufficient human and financial resources.</p>
<p><i>... managing tensions and potential conflicts within countries featuring a diverse population.</i> Decentralization might enable minority groups to enjoy a degree of self-governance as well as to acquire a majority status in their own region. Political leaders of minority groups can fill a formally recognized leadership position at the regional level.</p>	<p><i>... local elites and politicians to demand greater autonomy.</i> <i>... the establishment of new regional majorities.</i> Assigning majority status to a national minority in a specific region might create new minorities, thereby only shifting instead of resolving the problem.</p>
<p><i>... encouraging positive, active approaches to government and policy development.</i> By creating alternative sources of governing authority, decentralization promotes policy competition, policy experimentation and policy innovation.</p>	<p><i>... harmful competition between regions.</i> Decentralization might lead to inequality and rivalry between regions, since natural resources, industries and employment opportunities differ by region. Moreover, a ‘race to the bottom’ might result as regions progressively weaken regulation in order to attract business and capital.</p>

... structuring the complexity of government.

By distributing suitable powers to regional or local governments, decentralization spreads the burden of government and enables the national centre to focus on key challenges and priorities.

... duplication of work and greater operating expenses.

Decentralization can duplicate government functions and permit inefficient, overlapping or contradictory policies in different parts of the country. Decentralized systems also cost more given the greater number of elected or paid officials at several levels of government.

Another important context-related variable that influences the effectiveness of decentralization is the dynamics of the political party system in a country—in particular whether parties are regionalized. For instance, the degree to which regionalized national parties or independent regional parties dominate the regional political landscape might determine how far decentralization as a constitutional design materializes into the decentralization of political power.⁵

Identifying the proper form and design of decentralization may be one of the most challenging tasks for constitution builders. Success can also turn on the power brokers involved and dynamics of the political party system in a country. Powerful interests can misuse decentralization for private interests.

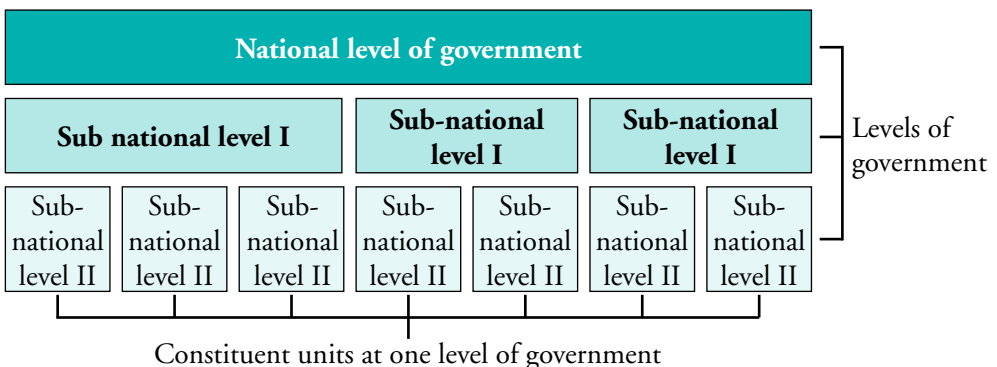
3. Design options

3.1. The configuration of decentralization: setting the formal structure

The configuration of decentralization provides the territorial structure of a country. Several questions are worth considering in this respect.

- How many levels of government should operate in a country? Are there reasons to add or subtract levels of government compared to the previous governmental structure? What consequences will follow such a change?
- Should all territories in the country implement a uniform level of government?
- How many constituent units at a specific level are feasible? For example, at a local level, how many would maximize the delivery of governmental services at the lowest costs?
- Can and should constitution builders postpone certain aspects of decentralization for a later stage?
- At a later stage, what options exist to adjust the internal decentralized structure?

Figure 3. Levels of government



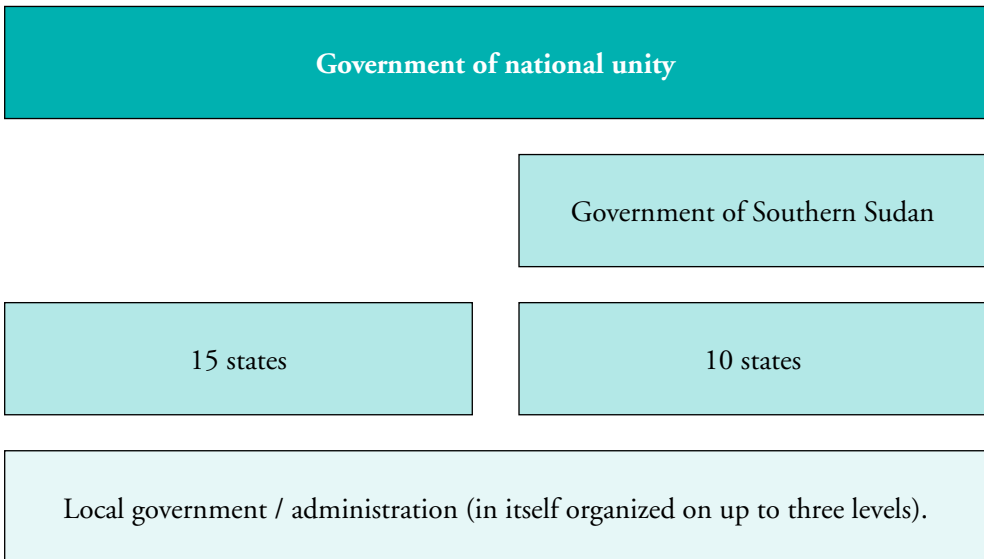
3.1.1. Number of levels of government

Three levels of government/administration generally dominate the discussion: a national level, a regional/provincial/state level, and a local level. Yet reality is not so neat, as the 'local level', for instance, can comprise various sub-levels of government/administration.

Previous compromises or historical events may have determined the number of levels of government. Governmental levels often exist symmetrically throughout the country. Occasionally, however, countries have opted for an asymmetric formal structure, creating more levels of government in some parts of the country than in others (see e.g. figure 4).

Transferring authority to the regional, state or provincial level typically involves a struggle over controlling and balancing power. Decentralizing authority to local governments more often concerns service delivery.

Figure 4. The configuration of levels of government in Sudan

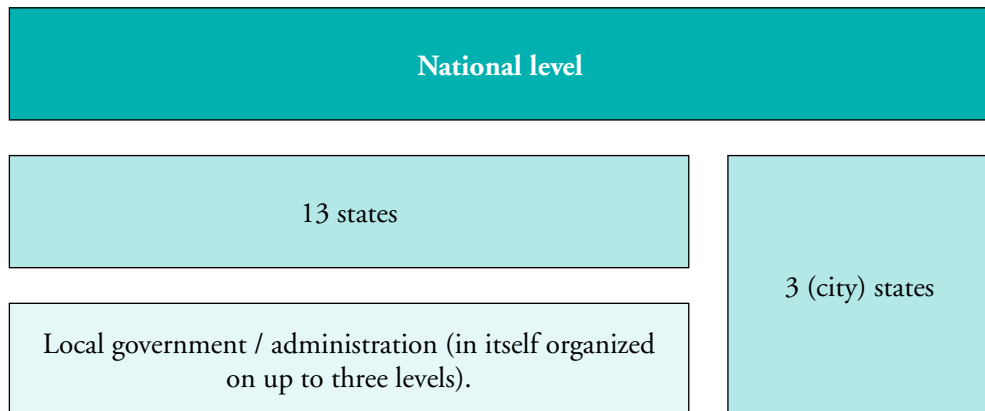


In some countries, the level of government immediately below the national level only covers parts of the territory (Sudan between 2005 and 2011⁶ and Tanzania⁷). In Sudan, for instance, the interim constitution created an additional and unique level of government with jurisdiction over just the south of Sudan (see figure 4). In the peace negotiations that led to the new Sudanese Interim Constitution, the southern rebels demanded this additional layer of government in order, after decades of war, to secure a common region for the people of southern Sudan.

In other countries, the metropolitan level of government falls directly beneath the national level, with no governmental subunits in between. In Germany, for historical reasons, three cities constitute both municipalities and states, which eliminates the third

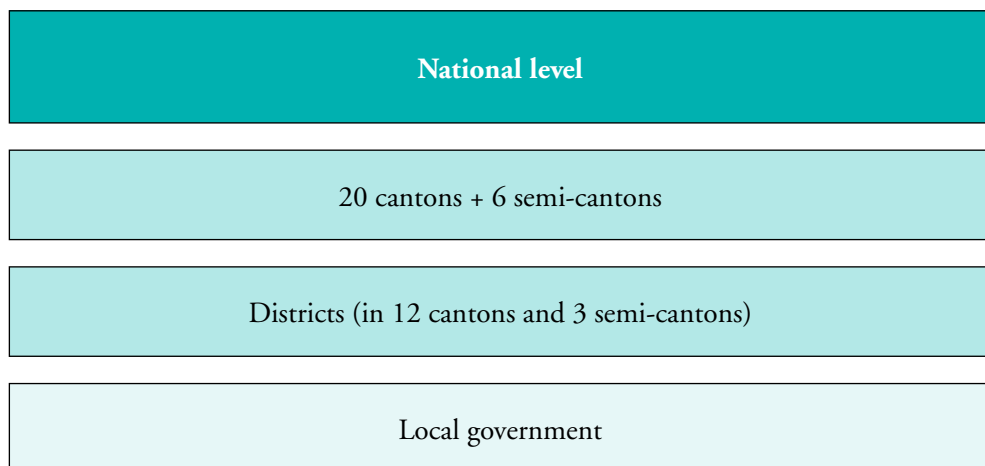
level of government present in other parts of Germany (the Prime Minister or Governor of the city-state of Hamburg is also the Mayor of the city of Hamburg) (see figure 5).

Figure 5. The configuration of levels of government/administration in Germany



In other countries, constitution builders have inserted an additional level of administration in larger territorial subunits. Those administrative units support the governments in implementing their policies. In Switzerland, the cantons (the equivalent of states or provinces in Switzerland) have districts as administrative units to implement the cantons' policies. However, smaller cantons do not need these units to administer their affairs and thus do not have administrative districts.⁸

Figure 6. The configuration of levels of government/administration in Switzerland



Importantly, the mere fact of an asymmetrical structure with various levels of government or levels of administration does not indicate per se the degree of decentralization:

Constitution builders can create subunits on the basis of economic and administrative viability, or of the efficiency of each unit, or of identity. A peace treaty might require identity-based governmental subunits.

whereas the additional level of government in southern Sudan greatly influences the political balance, as it has substantial powers and was a precondition for the peace agreement, the asymmetric administrative levels in Switzerland have had no real impact.

3.1.2. Designing territorial units within a level of government

In addition to the number of levels of government/administration, constitution builders need to determine the number of governmental/administrative units at each of those levels. Of critical importance are the criteria that constitution builders will use to construct subunits. Though these criteria are often predetermined by the character of a previous conflict, constitution builders can create subunits on the basis of economic and administrative viability, on the basis of the efficiency of each unit, or on the basis of identity. A choice on the merits of each option may not materialize because ratification of the constitution might depend on the success of a peace treaty that itself requires identity-based governmental subunits (Bosnia and Herzegovina, Sudan etc.). Determining subunits based on the criterion of identity might create a cycle of dispersing central powers, given that such a subunit will often demand further continuous concessions that strengthen its own identity (Catalonia in Spain). Identity-based subunits might create new minorities, since territorial subunits rarely feature only one identity. Failure to consider adequately the interests of this new minority could ignite conflict. On the other hand, opting for the economically 'optimal size', based purely on criteria such as infrastructure, geography, resources and capacities, does not necessarily guarantee effective and efficient governance. If ethno-political conflicts and marginalization are replicated at the level of the subunit due to its demarcation, this will not resolve the conflicts but only shift them to lower levels. Thus, a mix of approaches to create economically viable units which the relevant populations accept is needed.⁹ The continuing discussions in Nepal concerning the criteria for delimiting internal boundaries illustrate the challenges associated with resolving such issues (see box 2).

Box 2. Discussion on the configuration of a decentralized system of government in Nepal*

In Nepal, the Committee on State Restructuring and Distribution of State Power has debated the number, names and boundaries of states under the future decentralized/federal structure, a discussion that has included the delineation of subunits on the basis of identity, economic and administrative viability, resource distribution and other factors. Two alternative maps were prepared under these parameters—one with 14 provinces, the other with six provinces.

Another important issue is whether the constitution should include an option to alter internal boundaries after its ratification, and, if so, who might participate in such a process. The more internal borders create self-governing entities rather than administrative districts, the more sensitive this question becomes. Such a process encompasses two aspects—the right to initiate and the right to decide. In strongly centralized systems, both aspects will belong exclusively to a national institution—for example, the legislature by initiating and passing an ordinary law (Benin¹⁰). Another constitution might state that a law shifting internal boundaries requires not only a majority in the national legislature but also a two-thirds majority of those representatives belonging to the affected groups (Belgium¹¹). Other countries require the legislatures of the affected regions to consent (Malaysia¹²). In addition to a legislative vote at the national and sub-national level, a constitution also may require referendum support from the citizens in the subunits (Switzerland¹³).

Opting for the economically ‘optimal size’ of subunits, based purely on criteria such as infrastructure, geography, resources and capacities, does not necessarily guarantee effective and efficient governance.

3.2. Determining the depth of decentralization

Beyond the formal structure of decentralization, constitution builders should also consider the depth of decentralization. The depth of decentralization (also referred to as substantive decentralization in this chapter) is determined by the actual powers that are transferred from the centre to lower levels of government. In such an inquiry, the following issues warrant careful review.

- Which administrative, political and financial functions should constitution builders decentralize and to what tier of government?
- Should constitution builders devolve powers equally throughout the country or asymmetrically depending on the specific context

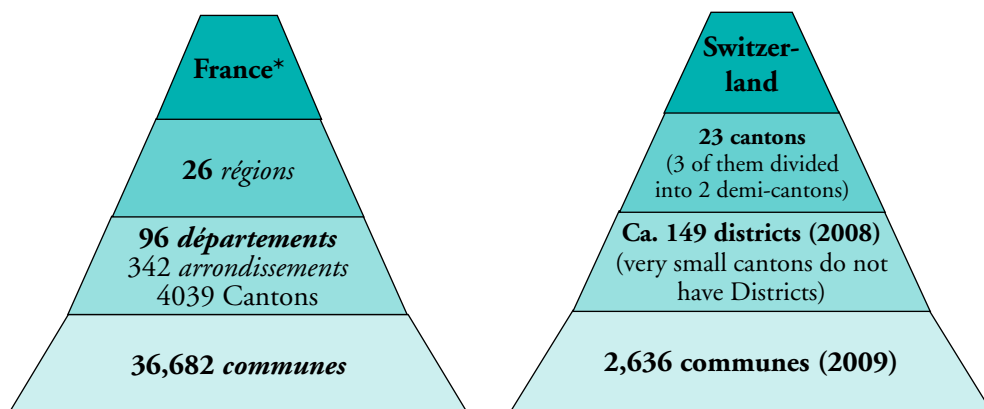
In addition to the number of levels of government/administration, constitution builders need to consider the depth of decentralization, or the substantive powers to be transferred from the centre. The formal structure of government does not determine the depth of decentralization.

(population density, minorities, etc.)?

- Should some levels act merely as administrative agents of a higher level? Should other levels of government receive self-governing authority?
- Which of the three branches of government should constitution builders establish at the lower levels?

Figure 7 reflects the formal structure of decentralization in France and Switzerland. Although they look quite similar, France—even after its decentralizing reforms in 1982—has a much more centralized government than Switzerland, which many consider one of the most decentralized countries. The pyramids underscore that the formal structure of government does not determine the substantive degree of decentralization; rather, the depth of decentralization turns on the powers and resources allocated to the different levels of government. For instance, the cantons in Switzerland have considerably more authority and autonomous powers than the regions in France, as reflected, for instance, in the cantons' significant tax-raising authority. Although the Swiss districts constitute purely administrative units supporting the implementation of canton policy, their leaders are elected, whereas the presidency appoints French 'prefects' who serve as agents in the *départements* and implement central government policy.

Figure 7. Structures of decentralization in France and Switzerland



* The communes of France d'outre-mer are not considered

3.2.1. Administrative, political and fiscal dimensions of decentralization

Substantive decentralization means the assignment of authority and power to different levels of government. The degree of decentralization ranges on a continuum across systems, from those characterized as strongly centralized to those that are heavily decentralized. To measure the amount of decentralization more accurately, we need to consider its three core elements—administrative decentralization, political decentralization, and fiscal decentralization. Administrative decentralization refers to the amount of autonomy non-central governmental entities possess relative to the central

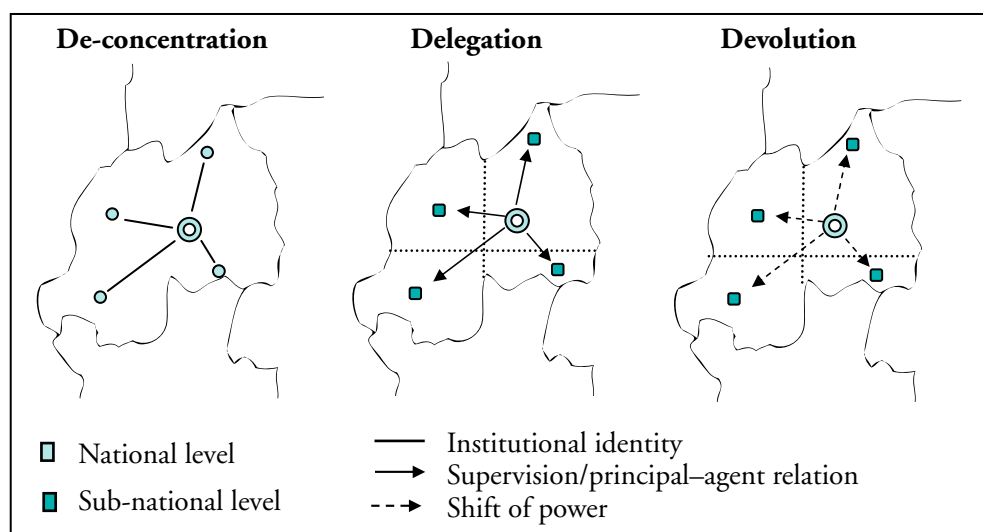
government. Political decentralization measures the degree to which central governments allow sub-governmental units to undertake the political functions of governance such as representation. Finally, fiscal decentralization means the extent to which central governments surrender fiscal responsibility to sub-national units. While distinguishing between these three elements facilitates measurement, effective decentralization requires coordinating all three. Decentralization of authority will remain shallow if, for example, administrative and fiscal decentralization does not support and follow political decentralization. All three are discussed in detail below.

There are administrative, political, and fiscal decentralization. Effective decentralization requires coordinating all three.

Administrative decentralization

Administrative decentralization comes in three varieties—‘de-concentration’, ‘delegation’ and ‘devolution’—with each term encompassing additional administrative autonomy (see figure 8).

Figure 8. De-concentration, delegation and devolution: the distinctions



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

De-concentration occurs when the central government shifts responsibility for implementing a policy to its field offices. This transfer alters the geographic distribution of authority, but responsibility and power remain at the centre. De-concentration does not transfer actual authority to lower levels of government and thus fails to create additional levels of government. For example, high schools are a national issue, governed by national law and implemented by national agencies—building schools, administering schools, setting up curricula, hiring and paying teachers: in short, everything is done by the national level. However, since high schools are not only in the capital, but spread

Administrative decentralization can mean de-concentration, delegation or devolution.

throughout the country, national civil servants and teachers are sent out in the country to run them, without changing the nature of a national institution.

Delegation requires the central government to refer decision-making and administrative responsibilities for various public functions to another level of government. Delegation features a principal–agent relationship, with the central government acting as principal and the local institution acting as agent. The degree of supervision varies and might include substantial central control, permitting little discretion at the lower level. Conversely, though enforcing adherence to formal guidelines, the central government might fully allocate the administration and implementation of policy to the subunits. For example, high schools are still national institutions and governed by national laws, but the implementation lies with the subunits under the general supervision of the national Ministry of Education.

Devolution represents the strongest form of decentralization and involves the transfer or shift of a portfolio of authority to regional or local governments. Again, various models exist. The portfolio may include either limited powers to implement a set of national laws concerning a particular area—with potentially significant discretion over implementation—or may more closely resemble self-governance in that the subunit exercises legislative powers—adopting rules and norms and devising policies and strategies. Depending on the degree of devolution, the central government might interfere only to a limited extent, if at all. A degree of political decentralization must accompany devolution, given that the central government no longer has sanctions over the subunits; the electorate must assume that responsibility by voting in popular elections. For example, high schools are a sub-national issue, governed by sub-national law and implemented by sub-national agencies—building schools, administering schools, setting up curriculums, hiring and paying teachers: in short, everything is done by the sub-national level. Sub-national units coordinate among themselves a coherent education policy for the country.

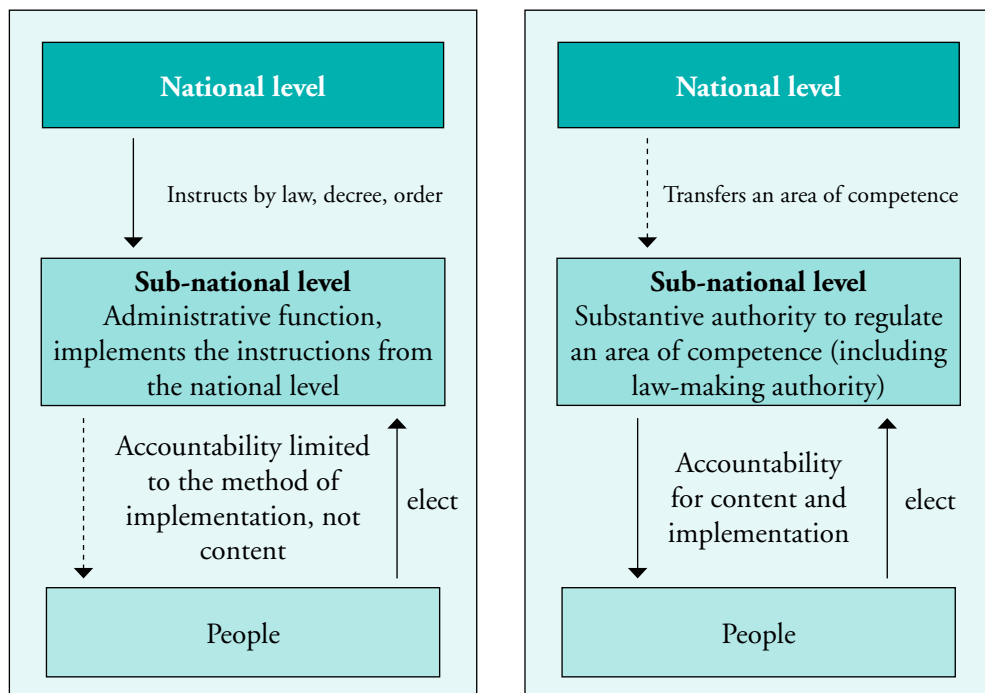
Political decentralization

Political decentralization involves two elements: (a) transferring the power to choose and appoint local officials from the central governments to local governments; and (b) transferring the authority to structure government at the regional or local level. The first element could be named electoral decentralization, which allows citizens to elect representatives who will serve in regional or local subunits. Yet even with the ability to elect local officials, citizens will only be able to influence policy to a limited extent if policies are still decided at a higher level. For example, while citizens elect the Swiss Head of District, his/her mandate extends only to implementing administrative directives from the cantons (see above). Citizens can thus hold this representative accountable only for implementation, not for substantive policies that are developed at cantons' level.

Promoting the second element of political decentralization requires—in addition to permitting voters to select their local leadership—a structural arrangement and practice

that also empower the local level to formulate, monitor and evaluate the task transferred from the national centre. This may even be done by legislative or quasi-legislative bodies whose remit extends to designing and elaborating on policy issues transferred from the national government.

Figure 9. Examples of political decentralization



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

Fiscal decentralization

Fiscal decentralization determines the degree of financial autonomy. Without sufficient financial resources, regional or local authorities will not be able to perform their newly assigned tasks adequately, thus weakening accountability and legitimacy. Omitting or delaying fiscal decentralization, moreover, often renders other aspects of decentralization ineffective.

There are three main elements to fiscal design in decentralized states: (a) the assignment of responsibility for expenditure—which level pays; (b) the assignment of responsibility for revenue raising—which level taxes; and (c) intergovernmental transfers—how different levels of government share revenues and equalize imbalances. To guarantee efficient administration, the ability to assign tasks and competences must accompany the assignment of responsibility for expenditure—the level of government performing a

task should pay for it. It might be assumed that spending responsibility often correlates with revenue-raising responsibility, or the power to raise taxes, but this does not occur anywhere. Good reasons exist for striking the right balance here. If the constitution assigns the greater part of taxing authority to regional or local governments, the national government will lack the tax instruments necessary for macroeconomic management. Likewise, assigning all taxing authority to the national government also results in

undesirable consequences: by separating spending authority from revenue-raising responsibility, it might obscure the link between the benefits of public expenditure and its cost—namely, the taxes levied to finance them, so that the separation does not promote fiscal responsibility among regional and local politicians and their electorate.

Omitting or delaying fiscal decentralization often renders other aspects of decentralization ineffective. The assignment of responsibility for expenditure must accompany the assignment of tasks and competences.

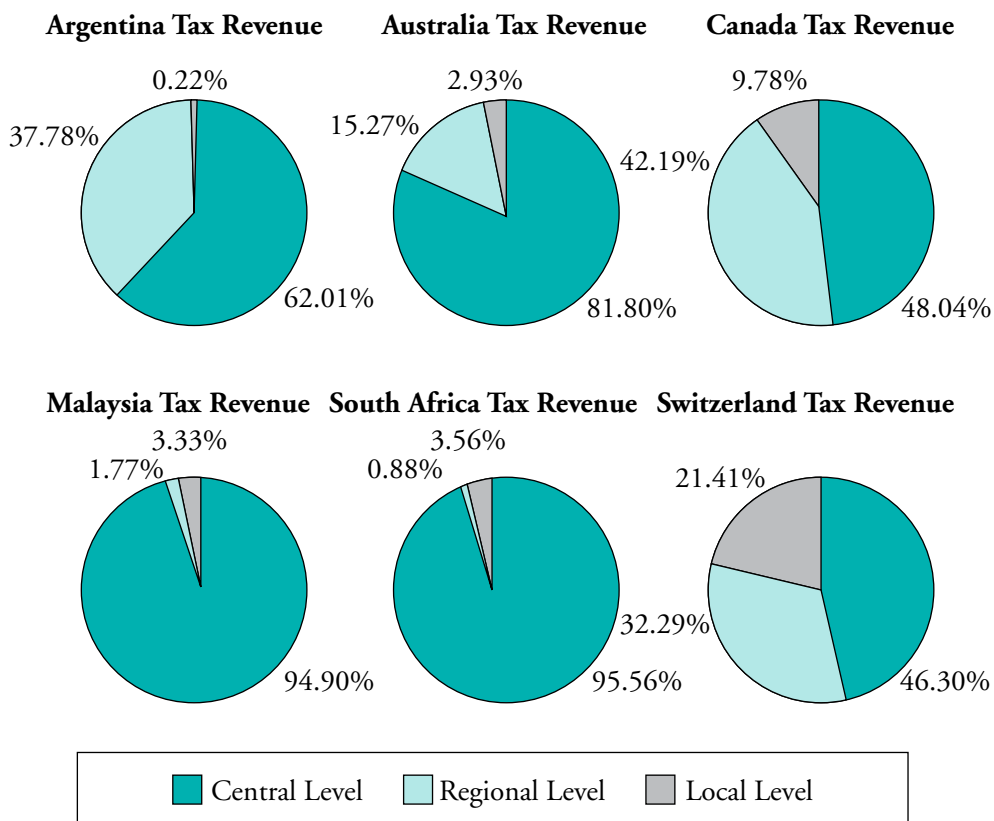
Constitution builders should thus consider the following two principles when determining whether to assign tax-raising and spending authority to regional or local governments: (a) revenues assigned to the regional or local governments should suffice—at least for the wealthy regional or local governments—to finance all locally provided services that primarily benefit local residents; and (b) the local government should collect sub-national revenues from local residents tied to the benefits received from local services. Ensuring a link between taxes paid and benefits received strengthens the accountability of local officials and thus also the delivery of government services.

As highlighted above, an imbalance often exists between taxing and spending in that the national level usually collects the bulk of taxes but assigns substantial spending responsibilities to the regional or local level, the governments of which must spend more than they can collect in revenues. Pre-transfer fiscal deficits, so-called vertical imbalances, arise. Horizontal imbalances—imbalances between sub-national levels—also exist. Usually sub-national-level governments do not all have the same capacity to raise revenues—as rich residents cannot live in every region—nor do they all face the same costs—some regions provide additional services, or more people live there. Such imbalances make intergovernmental transfers—vertical if the payments proceed from the national government to the sub-national governments, or horizontal if between sub-

national governments—necessary. The term ‘grants’ covers intergovernmental transfers from higher to lower tiers of government. Depending on the type of grant—general-purpose grants, specific grants, grants in aid, or supplementary grants—and the conditions attached, such transfers can increase the autonomy of subunits.

Usually sub-national-level governments do not all have the same capacity to raise revenues, and intergovernmental transfers—from the national government to the sub-national, or between sub-national governments—may be necessary.

Figure 10. Revenue-raising competences: examples from six countries



Source: International Monetary Fund. (2008). Government Finance Statistics Yearbook 2008 (Vol. XXXII). Washington, DC: International Monetary Fund.

3.2.2. Symmetric and asymmetric decentralization

The depth of decentralization along administrative, political and fiscal lines need not be symmetrical throughout the country. Asymmetrical decentralization might prove an effective policy tool. If constitution builders have agreed to decentralization to mitigate internal conflicts between particular regions, then assigning autonomous authority only to those regions makes sense. For examples, see Finland (Åland), Indonesia (Aceh), Italy (South Tyrol), Malaysia (Borneo) the Philippines (Mindanao), Sudan (Southern Sudan) and Tanzania (Zanzibar). Some such schemes combine differences in the *substantive* depth of decentralization with the country's existing asymmetric *formal* structure, as in Sudan and Tanzania. Often, however, the constitution affords some regions greater authority over language or culture, for instance, while maintaining an otherwise symmetrical formal structure; examples here are offered by Indonesia¹⁴ or the Philippines.¹⁵ State nationalists often object to asymmetrical arrangements that discriminate between regions on the basis of ethnicity or religion, arguing that such arrangements risk further fragmentation and the promotion of irredentism. But minority

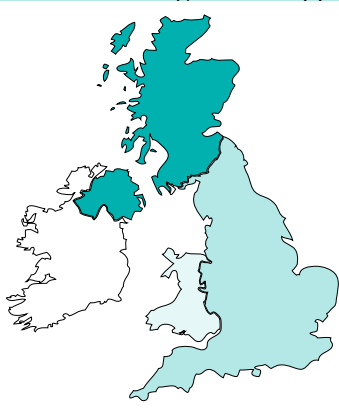
The depth of decentralization along administrative, political and fiscal lines need not be symmetrical throughout the country. Some countries have featured different decentralization packages for different regions.

regions which historically have suffered from marginalization and discrimination will often demand autonomous status as a condition of support for the constitution. Depending on the relative political strengths of the actors involved, asymmetric arrangements

vary considerably. Some countries have featured different decentralization packages for different regions. The United Kingdom (UK) and Spain provide good examples of the variety of decentralization design options (see box 3 and box 4).

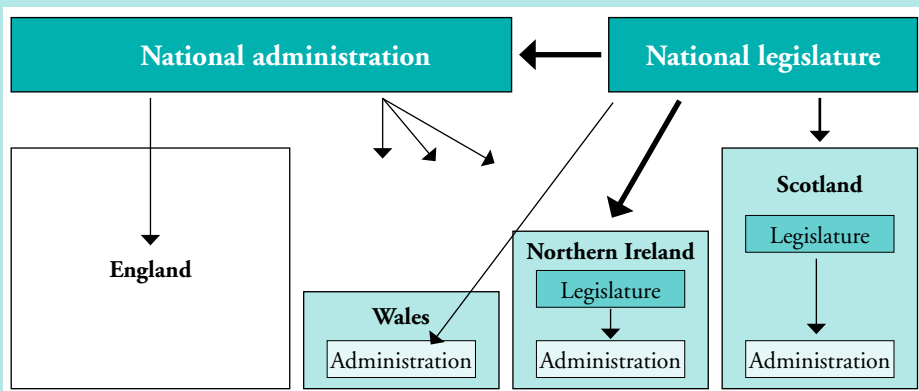
Box 3. Case study: asymmetric decentralization in the UK

The United Kingdom has applied various designs of decentralization to Scotland, Wales and Northern Ireland. Compared to England, where the British Parliament enacts laws that the national administration implements, the other three regions feature various levels of delegation.



Scotland has a Parliament and an executive developed from the Westminster model. Under the Scotland Act 1998, the Scottish Parliament can pass acts* and the Executive can enact administrative regulations (often called secondary legislation) in all areas not reserved to the British Parliament. Although the Act permits the British Parliament to legislate concurrently in the devolved areas, it will do so only if asked by the Scottish Parliament (Sewel Convention).

Although the Act permits the British Parliament to legislate concurrently in the devolved areas, it will do so only if asked by the Scottish Parliament (Sewel Convention).



The *Government of Wales Act 1998* delegated powers in certain devolved areas to the National Assembly for Wales, powers previously exercised by British ministers. But the British Parliament still passes primary legislation for Wales

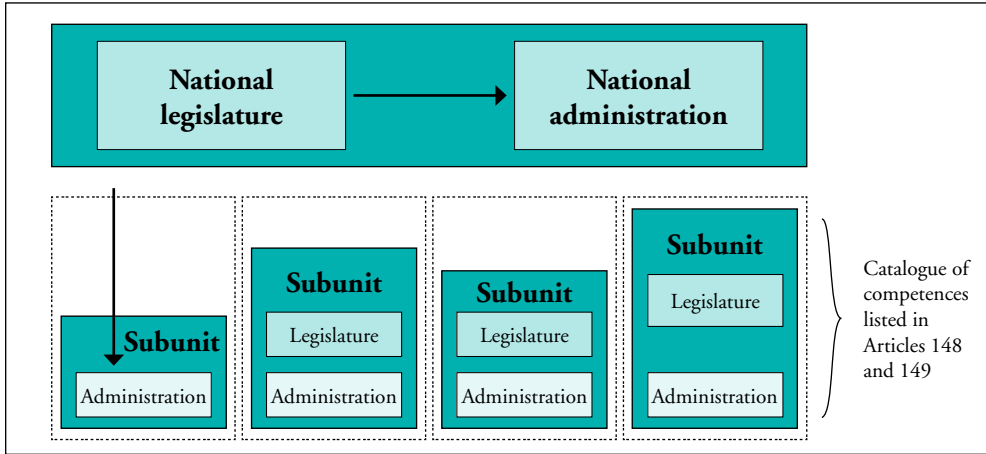
even in the devolved areas, limiting the Assembly to enacting administrative orders and regulations.

Devolution in Northern Ireland has been inextricably bound up with the peace process. Problems there have prompted the British Parliament to suspend the Northern Irish Assembly and Executive four times, most recently in October 2002. When functioning, the Northern Ireland Assembly can enact primary and delegated legislation in those policy areas transferred from the British Parliament, which still legislates in ‘excepted’ and ‘reserved’ areas. Unless the British Parliament amends the *Northern Ireland Act 1998*, it will continue to govern ‘excepted’ areas. By contrast, the British Parliament can transfer ‘reserved’ subjects by order at a later date given cross-community consent. This triple division of responsibilities is unique to Northern Ireland devolution.

* In addition, the Scottish Parliament has the power to vary the standard rate of income tax by up to 3 percentage points from the UK level (although it has not yet used this power). See Böckenförde, M., Schmidt, J. and Wiesner, V., *Max Planck Manual on Different Forms of Decentralization*, 3rd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009), p. 46.

The Constitution of Spain offers another approach often referred to as ‘decentralization à la carte’. After some 40 years of totalitarian centralization under the dictatorship of General Franco, the drafters of the Constitution created a unique mechanism to accommodate the diversity of the country in the 1978 Constitution. The main inventive feature of the Spanish Constitution is to provide for a constitutional system in which different provinces/municipalities could achieve the status of a high degree of autonomy at different paces, in part depending on their own initiative. Territorially, Spain is organized into ‘municipalities, provinces, and any Autonomous Communities that may be constituted’ (Article 137). Accession to autonomy is a voluntary right for municipalities and provinces and the constitution specifies how this right can be exercised and the status of an Autonomous Community may be achieved. A list of powers of autonomous communities is listed in Article 148. In addition, according to Article 150, the national government may transfer powers from its list (Article 149) to the autonomous communities.¹⁶

Box 4. Case study: decentralization à la carte in Spain



3.2.3. Which kinds of powers to which level of government?

Constitution builders will determine the depth of decentralization and its institutional structure by channelling powers to the three branches of government at the regional or local level. The first step, as mentioned above, requires a decision on which branch of government should be set up at which level of government or administration (see table 2). Only if the institutional design provides for a legislature or judiciary at a lower level of government can actual substantive powers be transferred to that level.

Table 2. Which kinds of powers to which level of government?

	Executive	Legislature	Judiciary
National level	✓	✓	✓
2 nd Level (e.g. subunits, regions, etc.)	?	?	?
3 rd level (e.g. local level)	?	?	?

As illustrated by the United Kingdom, the second level of government may have an executive only, as in Wales, or consist of both legislative and executive branches of government, as in Scotland. Other countries, such as India and the United States, have set up an autonomous judicial branch at the sub-national level, responsible for adjudicating issues and disputes concerning sub-national laws.

In a second step, the constitution must then identify the tasks and powers that an autonomous executive, legislature or judiciary will exercise.

Constitution builders may need to design executive, legislative and judicial authorities at various levels of government. Distributing appropriate responsibilities will depend on the task concerned, and on whether it is closer to drafting laws (a legislative function), implementing or executing the law (an executive function), or interpreting and applying the law (a judicial function).

Constitution builders will need to determine which of the three branches of government—executive, legislative and judicial branches—will be set up at different levels of government. Distributing appropriate responsibilities will depend on the task concerned.

Decentralizing legislative powers

Decentralizing legislative functions requires considering which level of government should write laws concerning particular tasks (e.g. public services) and whether that authority should be exclusive or shared between levels of government.

A constitution might assign legislative authorities exclusively either to the national or to sub-national levels. Such an allocation, however, confronts two challenges. Particularly after a violent conflict caused by the marginalization of certain regions, competing factions will probably not agree to assign power exclusively to any level of government. The second challenge to the exclusive allocation of power is more practical: relying only on exclusive powers may ignore the fact that there is often inevitably a subject matter and jurisdictional overlap in many areas of regulation. Many constitutions, in a bid for flexibility, have opted to distribute legislative powers concurrently between national and regional governments.

Concurrent powers can operate differently. Given the vertical overlap of concurrent powers between national and regional legislatures, the question of which regulation prevails will arise. Generally, the constitution prioritizes the national legislature. Regional critics may argue, with some force, that areas of concurrent jurisdiction are simply areas where national legislation predominates and in the long run pre-empts regional legislation. But certain conditions can attach to national priority: the German Constitution, for example, grants supremacy only to national legislation that is ‘necessary’ and ‘in the national interest’: *‘[I]f and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’*¹⁷

Which level(s) of government shall be able to make law? Should that authority be exclusive to one level or shared between levels of government? Particularly after a violent conflict caused by the marginalization of particular regions, competing factions will probably not agree to assign law-making power exclusively to any level of government.

Other constitutions hold differently. Canada provides one single notable exception to national supremacy: where provincial and national law conflict—as laws concerning old age pensions have—provincial law prevails.¹⁸ Another approach empowers the

national legislature to draft a national framework while allowing regional legislatures to fill in details according to local circumstances (sometimes referred to as framework legislation or shared powers). Other constitutions have adopted a third approach to sorting out concurrent powers, essentially permitting both levels of government to regulate simultaneously. Only where national and regional legislation directly conflict will constitutional dispute resolution measures take effect, as applied by judges on a case-by-case basis (Sudan).

The Constitution of South Africa provides a very diligently drafted set of provisions as to how to settle potential conflicts in the functional areas where concurrent powers apply (see box 5).

Box 5. Concurrent powers: the South African example

Art. 146 of the Constitution of South Africa

Conflicts between national and provincial legislation

- (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4 [concurrent powers].
- (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
 - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
 - (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
 - (c) The national legislation is necessary for—
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
 - (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - (b) impedes the implementation of national economic policy.
- (4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a

court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

- (5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.
- (6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
- (7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.
- (8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

Source: Constitution of South Africa (1996) as of 2007. Available at www.constitutionnet.org

To avoid the situation in which none of the levels of government has the power to assume a specific task, one of the levels is normally attributed with the general or residual power. In some countries, the national level is vested with the residual power (Canada, India), while in others the residual power is with the subunits (Germany, the United States of America (USA)).

One approach is to empower the national legislature to draft a national framework while allowing regional legislatures to fill in details according to local circumstances.

There are different methods by which to embody the distribution of powers in the constitution. Some countries apply a system of enumerated powers. The constitution enumerates the national powers. The subunits have the residual power; therefore it is not necessary to specifically list the subunit's powers. Probably more common is a system of schedules: the constitution lists exclusive powers of the national level and the subunit level, a list of concurrent powers and shared powers, and may propose a list for the lower level of government.

The degree of substantive allocation of powers to legislative subunits depends on the diversity of a particular country. Many criteria—geographical, historical, religious, economic and demographic—have influenced the negotiators of constitutions significantly, determining the degree of actual decentralization of legislative powers. Although several of the subject matters of legislation—international relations, national defence, currency and citizenship—are typically reserved to the national level, the dispersal of many policy areas turns on the relevant circumstances and the balance of interests at stake. In Brazil, India and South Africa, the constitution also distributes specific powers to a third, local level of government.

Decentralizing executive functions

Prior to decentralizing executive functions, constitution builders should consider whether the local or regional executive will execute and implement: (a) only national law,

due to the absence of a legislature at the regional or local level; (b) only regional or local law drafted by the regional or local legislature, given that the national administration exclusively will implement national laws; or (c) substantial portions of national law in addition to regional or local law—if, for instance, the regional or local level executes national regulations more effectively (often referred to as ‘cooperative decentralization’ or ‘cooperative federalism’). Experts generally agree that to ensure the most effective and cost-efficient delivery of public services constitution builders should assign authority for delivering those services to the level of government that most closely represents—and is most closely accountable to—the beneficiaries of those services (often referred to as the principle of subsidiarity).¹⁹ Such an arrangement fosters transparency and accountability because citizens can more easily recognize who is spending their money

Experts generally agree that to ensure the most effective and cost-efficient delivery of public services constitution builders should assign authority for delivering those services to the level of government that most closely represents—and is most closely accountable to—the beneficiaries.

Constitution builders might agree that the national level of government is better able to provide certain public services, such as old age pensions and unemployment benefits, to which all citizens should have equal access wherever they live, or to manage expenditure which affects aggregate demand or fluctuates with the economic cycle.

and how. (This reasoning does not always compel the conclusion that sub-levels ought to provide particular services: determining the most efficient size of a programme can also reveal which governmental level should provide the service. For instance, some programmes, such as the weather forecast, might function efficiently only if provided to the whole country.)

Regional preferences also affect which governmental level should deliver particular public services. For example, many regions might favour a primary education curriculum that includes the teaching of local language(s) and culture, which sub-national governmental units can provide more efficiently. On the other hand, constitution builders might agree that the national level of government is better able to provide certain public services, such as old age pensions and unemployment benefits, to which all citizens, for equity reasons, should have equal access no matter where they live. Moreover, to avoid economic instability or budget imbalances, the national government might retain certain expenditure responsibilities which particularly affect aggregate demand or which fluctuate with the economic cycle, such as unemployment benefits. Public demand for minimum standards throughout the country covering certain public services, such as health and education, might call for national regulation, regulation that might merely set national guidelines for regional governments which will implement the programmes.

Distribution of judicial powers in a decentralized system: two models²⁰

Similarly, the question of whether to decentralize the judiciary will require constitution builders to consider whether national courts located throughout the country or regional courts set up by regional governments should interpret and apply regional or local laws.

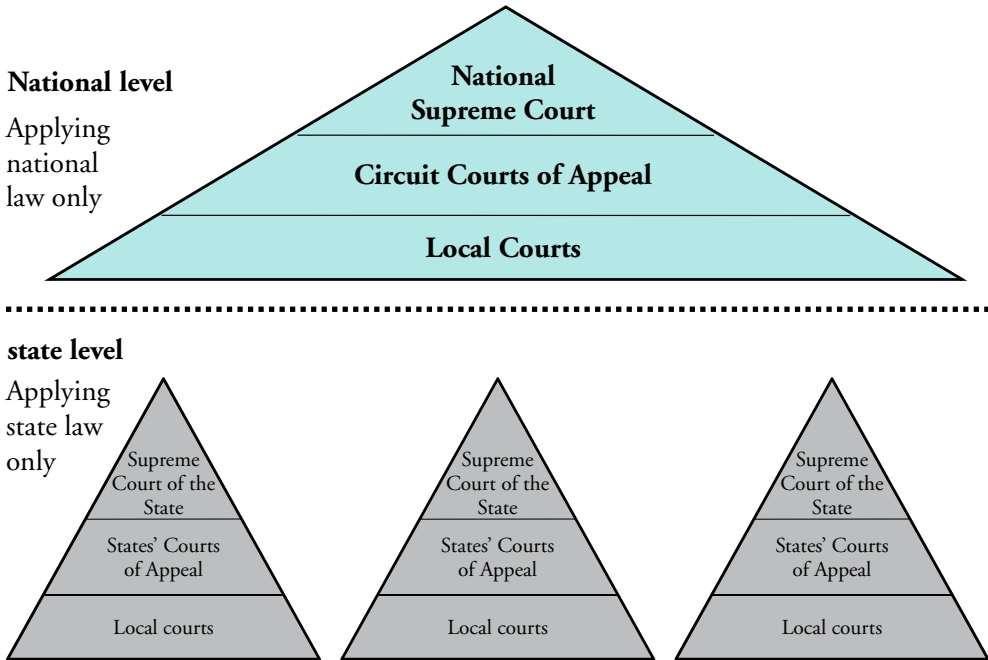
In a decentralized system there usually exist several sets of law: the national law, enacted by the national legislature, and the laws of the subunits, drafted by the respective entities, be it at a regional level or even at a local level. Thus one crucial question is how the different sets of law are to be adjudicated; in other words, what kind of court system guarantees an effective and transparent way of adjudicating the different sets of law? Two basic models are therefore available in highly decentralized states: the separated/dual model and the integrated model. Both describe options for ways of sharing judicial competencies in a strongly decentralized system.

If judicial powers are to be decentralized, one option is for the national level and the state level each to have their own court system. The state courts will generally apply the laws of their respective states only, while national law is adjudicated by national courts. National local courts applying national law are dispersed throughout the country.

The separated/dual model*

According to the separated/dual model, as applied for example in the USA, both the national level and the state level each have their own three-tier court system (local courts, circuit courts of appeal and Supreme Court) (see figure 11). The state courts generally apply the laws of their respective states only, whereas national law is adjudicated by national courts. As a consequence, national local courts applying national law are dispersed throughout the country. The separate model also affects the financing and the administration of the courts. While the national courts are financed and administered by the national level, the state courts are financed by the respective states.

Figure 11. The separated model in a decentralized system



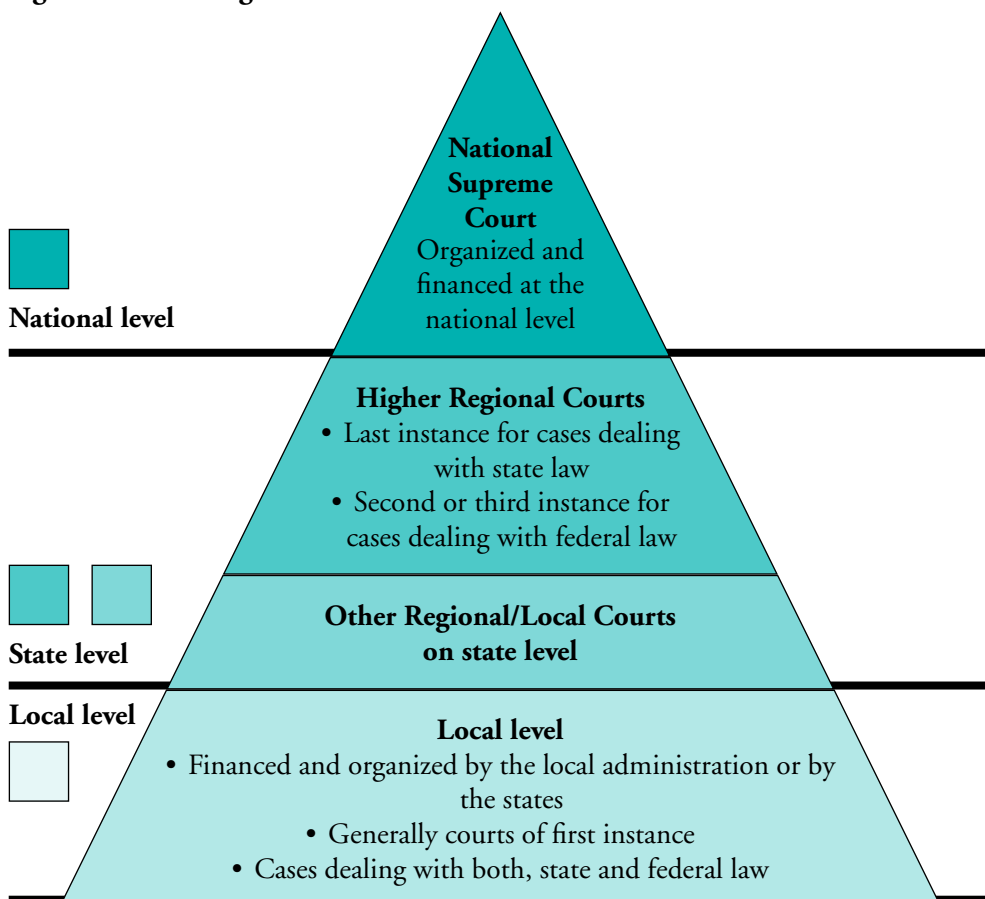
Source: Adapted from Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Max Planck Institute, 2009). See also: Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Unpublished, 2009)

The integrated model*

In an integrated model (as the name suggests), national courts and state courts are integrated in one system. Whereas the highest court is a national one, the lower courts are courts of the respective states where they are situated. Courts have the power and the capacity to deal with both state law cases and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective state law. In countries where the integrated model is in use, the highest court of the country at the national level only has jurisdiction over national law cases, whereas the highest court in the state is the court of last instance for state law (as in Germany and Sudan). In other systems, both types of cases, those involving state law as well as those involving national law, can be appealed before the Supreme Court (as in India).

* Adapted from a discussion in: Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Max Planck Institute, 2009).

Figure 12. The integrated model



Source: Adapted from Diehl, Katharina, et. al. *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Max Planck Institute, 2009). See also: Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Unpublished, 2009)

Advantages of each model

Each system has some advantages over the other. An integrated court system usually raises fewer conflicts concerning jurisdiction or the respective competencies of the different courts. It is less expensive, since there are fewer courts and judges. With the integrated model the laws are applied more uniformly, thus providing a greater degree of predictability of judicial decisions. In contrast, the separated model ensures more independence and variety. Different entities (states, tribes or regions) have more leeway to

Under an integrated judicial model, national courts and subunit courts function as one system. The highest court is a national one and the lower courts are courts of the respective states where they are situated. Courts have the power and the capacity to deal with both state law cases and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective state law

develop their own case law. This is even more important in countries where different legal systems are applied (common law–civil law (Canada, the UK)). Hence, within a country different laws and standards can exist in its different states at the same time. The separated model also provides for some competition between the legal orders of the different states.

3.3. Legal safeguards for decentralized arrangements: a key aspect of federal systems

3.3.1. Introduction

Constitution builders can evaluate the degree of decentralization by examining the substantive power and authority distributed to lower levels of government. A complementary perspective also exists: constitution builders can assess the legal relationship between the different levels of government, including the legal commitment to decentralization. Relevant questions include the following. Do national authorities exclusively determine whether to delegate, transfer or withdraw regional or local autonomy? Might a national legislature unilaterally restrict or even abolish regional and local autonomy at will (though that may prove politically difficult)? Or does the constitution protect certain elements of decentralization—requiring, for instance, a constitutional amendment to revoke regional powers? Does the constitution explicitly articulate a legal framework for decentralization that can guide governmental institutions attempting to decentralize? In short do political institutions—either at the national or regional level—or legal institutions, guided by an explicit legal framework, control decentralization?

The legal relationship between the different levels of government is an important perspective. Do national authorities exclusively determine whether to delegate, transfer or withdraw regional or local autonomy? Might a national legislature unilaterally restrict or even abolish regional and local autonomy? Or does the constitution protect certain elements of decentralization?

Not surprisingly, constitutions around the world have addressed decentralization differently. Some fail to mention all applicable levels of government and provide little guidance on how particular levels should function.²¹ By default, these constitutions permit the national legislature to create the framework, whether legal or political, for decentralization. Other constitutions explicitly list the levels of government and design decentralization parameters and guidelines for the national legislature to

follow.²² Still other constitutions devise a framework for decentralization between the national centre and governmental subunits directly below, neither prohibiting nor promoting further decentralization. Given such an arrangement, the national legislature will probably determine any further expansion of decentralization.

Many constitutions define governmental subunits as agents of the national government formed for administrative purposes only.²³ At the other end of the spectrum, the constitution can forge a partnership between the national government and subunits for the purpose of

sharing the tasks and challenges of governance. Constitution builders can create such a partnership by ensuring that amendments to decentralization provisions can proceed only with the consent of governmental subunits, expressed either through a second chamber in the national legislature where the subunits are represented, or by legislative assemblies at the subunit level.

Constitution builders can create a partnership between the national government and subunits by ensuring that amendments to decentralization provisions can proceed only with the consent of governmental subunits.

3.3.2. Federal vs unitary and decentralized vs centralized: legal differences

Two different, bifurcated concepts can complicate discussions on the vertical dispersal of governmental power: in designing a multilayered governmental structure, constitution builders must determine not only whether to centralize or decentralize governmental authority, but also whether to construct a unitary or federal government. Practitioners often use the two concepts interchangeably—with federalism meant to describe a strong form of decentralization, and unitary meant to signify a form of aggregated power at the national centre. However, while federalism inherently requires a degree of decentralization and thus is a form of decentralization, it has a distinct meaning, and understanding the difference might sharpen the debate and positions of constitutional negotiators.

Constitution builders can measure the depth of decentralization by the *actual distribution* of administrative, political and fiscal power from the centre to various sub-levels of government. By contrast, the terms ‘unitary’ and ‘federal’ capture the legal *relationship* between various levels of government. Five elements—predominately inspired by the creation of federal countries such as Switzerland and the United States, where previously independent but loosely-connected sovereign entities established a new state (‘coming together federalism’)—have characterized a federal state.²⁴

- At least two levels of government exercise sovereignty over the same land and people.
- Both the central government at the national level and the regional government at the subunit level possess a range of mutually exclusive powers (self-rule), which might include a measure of legislative and executive autonomy or fiscal independence.²⁵
- A legal document provides that neither level can alter unilaterally the responsibilities and authority of each level of government.
- National decision-making institutions include representatives from the subunit level, who might occupy a second chamber in the national legislature (shared rule).
- The constitution provides an arbitration mechanism—whether a constitutional court or a referendum mechanism—that can resolve disputes between the federal centre and the subunit level.

From these five elements, we can formulate one prerequisite for a federal state: one level of government cannot unilaterally revoke the existing distribution of powers, which include exclusive competences at the sub-national level. Rather, any alteration of authority between governmental levels requires the consent of all affected levels. This kind of pact or partnership, *foedus* in Latin, was actually the eponym for the term ‘federalism’. In most federal countries, the representatives of the subunits sitting in the second chamber of the national legislature meet this criterion through their involvement in the constitutional amendment process.

Box 6. Personal federalism

In recent years, the term ‘personal federalism’ has gained attention. Since federalism is a specific form of decentralization, and decentralization has been defined above as a territorial concept (see section 1.1), this term may create confusion. The rationale of ‘personal federalism’ is ‘the recognition of a community defined by cultural, religious or linguistic characteristics rather than by territory, and the constitution of that community on the basis of the identification or personal choice of an individual, rather than on the basis of territorial location’.* Thus, certain rights and powers are assigned not to a specific territory but to a group of people (communities) that are often not territorially concentrated but dispersed throughout the country.

Those communities may even have their own institutions to regulate some of their affairs, predominately in areas of their identification (culture, education, language and/or religion). For instance, in the Ottoman Empire some issues were left to the religious communities (*millets*). In India, Israel and Lebanon matters of marriage are still determined by the different religious communities. Fiji recognizes the right of indigenous people to their own administration. Belgium applies a mixed approach and is divided into regions and communities.** Elements of ‘personal federalism’ can accommodate ethno-cultural groups, but this also involves some practical challenges: it might be difficult to achieve the necessary level of organization, provide services efficiently to a dispersed group, and so on. Aspects of the idea of ‘personal federalism’ are reflected in some design options for the representation of minorities in the chapters in this Handbook on the executive branch and the legislature (chapters 4 and 5, respectively).

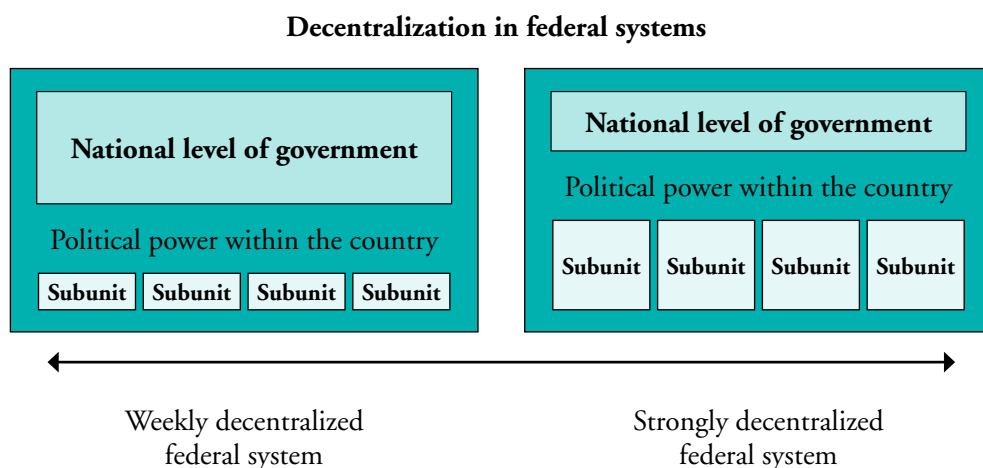
* Thalmann, U. and Widrig, C., ‘Contemporary Diversity versus Swiss Federalism’, New Trends in Federalism Working Paper no. 2 (Fribourg: Institute of Federalism, 2004), available at <http://www.federalism.ch/files/documents/New_trends_in_federalism_WP2.pdf>

** Baechler, G., ‘Territorial vs Ethnic and Personal Federalism: Issues & Practices’, Swiss Agency for Development and Cooperation (2008), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/Document_Archive>

Two important points follow. First, because federalism refers to a legally-defined intergovernmental relationship, it requires that only one such relationship among potentially numerous levels of government complies with the prerequisite above concerning revocation rights. For instance, all federal nations over the world have established the

prescribed relationship between the national and the regional, provincial or state level. None, however, has established that relationship between the national or regional level and the local level of government. Even in South Africa, where local governments secured a prominent role in the Constitution, a constitutional amendment involving no input from local governments may revoke all local authority. Using the term ‘three-tier federalism’, as occasionally happens, is therefore misleading. Second, the mere fact of a federal relationship between levels of government says nothing about the actual depth of decentralization—the amount of power constitutionally assigned to the subunits.

Figure 13. Decentralization in federal systems



Thus, terms such as centralized federal countries or decentralized unitary countries are not self-contradictory but indicate the actual depth of decentralization or the nature of the legal safeguards protecting intergovernmental relations within a country. For example, the power and authority that the British Parliament assigned to Scotland might be more extensive than that assigned to subunits within a federal system. But the United Kingdom is not a federal system, since the British Parliament—which does not feature a second chamber in which Scottish representatives serve—can unilaterally revoke all powers assigned to the Scottish legislature or executive. A federal government does not exist in Tanzania because the national centre can rescind all allocated powers from all regions except the island of Zanzibar. Thus no two levels of government operate throughout the country.

Properly distinguishing between federal and unitary on the one hand, and centralization and decentralization on the other, can avoid the confusion that complicates the already difficult task of choosing the best governmental structure. An early commitment to a federal structure in a transitional agenda—as happened in Nepal and Somalia, for example—can deprive drafters of asymmetric decentralization options that might better reflect the context and challenges of a particular country.

An early commitment to a federal structure in a transitional agenda can deprive the drafters of a constitution of asymmetric decentralization options that might better reflect the context and challenges of a particular country.

Box 7. Content counts: the Sudanese search for the best option of decentralization

‘We have not used any formal word in the entire CPA [Comprehensive Peace Agreement] to describe the type of governance that we have negotiated and agreed on. Perhaps we were guided by the African sign not to name a child before it is born. [...] In the IGAD [Intergovernmental Authority on Development] peace process, [...] SPLM [the Sudan People’s Liberation Movement] and GOS [government of Sudan] sat down to [...] negotiate and solve the serious problem of war and peace, instead of being bogged down in whether we should have a federation, a confederation or true federalism. Now that the child has been born researchers can give the name that they believe best depicts the arrangements the Sudanese have agreed in the Sudan Comprehensive Peace Agreement.’

John Garang, former President of Southern Sudan and First Vice-President of Sudan from SPLM Chairman’s address on the occasion of the Third Conference on Federalism, Brussels, Belgium, in ‘Sudan Vision’, 12 March 2005, available at <<http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=5800>> (accessed 22 May 2010)

4. Conclusion

Decentralization generally occurs for two reasons: (a) to locate the delivery of services closer to the people, for efficiency and accountability reasons; and (b) to promote harmony among diverse groups within a country, permitting a certain degree of self-governance. Particularly in societies fragmented by violent conflict, decentralization may support the peaceful coexistence of diverse groups, cultures and religions.

Decentralization includes a formal and a substantive element. Whereas the formal element addresses the structural configuration of government, the substantive element concerns the actual depth of decentralization, perhaps best measured in terms of administrative, political and fiscal decentralization. The binary concept of a ‘federal’ or ‘unitary’ government does not indicate the strength of decentralization in a country; rather, it describes the legal relationship between the various levels of government. Federal systems often require legal safeguards to implement and protect self rule and shared rule.

Table 3. Issues highlighted in this chapter*

Issues	Questions
<p>1. Levels of government</p>	<ul style="list-style-type: none"> • How many levels of government shall there be and why? Just the national level and the regions or shall there be additional levels of government (e.g. local government)? • How many levels of administration shall there be to facilitate the implementation of governmental policies? • Shall a level of government be introduced symmetrically throughout the country or asymmetrically in some areas only? • If there are more than two levels of government (national level and regions), shall all levels of government be established and regulated directly in the constitution? • Or shall the regional level have the power to decide on additional lower levels of government or administration, define their boundaries, transfer competencies and/or transfer resources? • Or shall there be a middle way—some basic mandatory or optional organizational rules in the constitution as well as certain flexibilities for the regions?
<p>2. Delimitation of regional boundaries</p>	<ul style="list-style-type: none"> • What criteria shall be used (ethnic, linguistic, religious, geographic, historical, economic, pre-existing administrative units, conflict potentials, others, combinations of these)? • Shall there be minimum requirements (minimum number of regions, minimum number of population, minimum level of resources?) • Shall regional boundaries be defined in the constitution or shall only criteria be included in the constitution? • Shall the population of prospective provinces have a say in the delimitation process? Shall minorities within prospective regions have a say in the delimitation process? • Shall there be time lines in the constitution (transitory provisions) for deciding on establishing provinces? • Shall the constitution include a procedure for changing regional boundaries, for establishing new regions, or for merging regions? • If yes, by whom and how can boundary change be initiated? • Who shall have a say in the procedure—the national level, the regions concerned, minorities within concerned regions, or all of these? • Shall there be specific criteria, e.g. minimum number of population, economic viability, to limit boundary changes? • Shall there be special majority requirements, consultation procedures, referendums?

3. Depth of decentralization

- What degree of **administrative decentralization** is envisaged for the subunits?
- Shall issues be delegated to lower levels of administration to facilitate implementation of policies?
- Or shall subunits have the power to decide on how to address the issue?
- Shall the degree of administrative decentralization be symmetrical throughout the country or asymmetric, considering the existence of minorities in some areas?
- What degree of **political decentralization** is envisaged for the subunits?
- Shall the subunit be able to elect those responsible for implementing national policies?
- Or shall the subunits also elect a legislative assembly to enact relevant laws with regard to the issue devolved (requires devolution as well as administrative decentralization)?
- What degree of **fiscal decentralization** is envisaged for the subunits?
- What minimum resources do the respective levels of government need in order to exercise their powers?
- What sources of revenue shall be allocated to the different levels of government?
- Shall revenue bases be shared or attributed exclusively to one level only?
- Who will tax the income of persons and companies, sales, services, land, vehicles, others?
- How and by whom shall rates for taxes, duties and royalties be set?
- Shall there be fiscal competition between subunits and different financial burdens for citizens?
- How shall revenues be distributed? Who shall be in charge of revenue distribution? Shall there be conditional and non-conditional grants? Shall the rules/quotas for distribution be regulated in the constitution? Are there regular review mechanisms to readjust the attribution of revenues?
- How shall differences in the financial capacity and service provision costs of provinces be addressed? Shall there be equalization mechanisms? How shall equalization take place? To what level? By whom? Who decides?

4. Organization of decentralization

- If subunits have the right to self-organization, will the constitution provide an interim organization until provinces can decide on their own organization?
- Or shall the internal organization of subunits be defined in the constitution (and national laws)?
- Or shall the constitution establish standards and guidelines for the subunits on how to organize themselves or provide different forms of organization for the subunits to choose from?
- What kinds of **exclusive powers** shall the national level/ regional level or even local level have?
- What kinds of powers shall be concurrent? Which regulation prevails in the case when both the national level and the regions regulate?
- Shall there be **shared powers**, e.g. the national level defines the policy or standards, while the regional level administers and enacts bylaws?
- What criteria shall be applied for the distribution of powers? Who decides?
- What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?
- Shall all subunits have the same amount of powers or shall **asymmetries** be possible?
- Who shall have the **residual power** (the power to decide when the constitution is mute), the centre or the provinces?
- How shall powers be listed in the constitution, e.g. in schedules?
- Shall all powers be shared in such a way that the national legislature has the power to draft a law, whereas it is within the competence of the subunit's executive to implement that law?
- How far shall the national level have the possibility to delegate powers to the subunits? Shall the national level have the possibility to delegate powers only to some selected regions? How far shall subunits have the possibility to delegate powers to the centre or to lower levels of government?
- Shall there be a **judiciary** at the level of subunits?
- If so, how shall it be organized? What is the relationship of the regional judiciary to the national judiciary (almost separate or all established under national law, or lower-level courts set up by the provinces and higher-level courts by the centre)?

5. Legal safeguards for the decentralization package	<ul style="list-style-type: none"> • Shall there be a mechanism established that requires the regions' consent if the decentralization package is to be altered? • If there are substantive powers transferred to the local level, shall their consent be required as well for the alteration of that transfer?
6. Conflict resolution mechanisms for the decentralization package	<ul style="list-style-type: none"> • What kind of dispute resolution mechanisms shall be provided? Shall there be special courts, regular courts, direct jurisdiction of the supreme court for specific disputes?

* This is an adjusted and redesigned template informed by the 'roadmap to federalism' in [Töpperwien, Nicole], Input Papers on Federalism, Papers on Federalism prepared for the Nepali Swiss Forum on Federalism (Swiss Agency for Development and Cooperation, 2007–08), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/.../resource_en_178456.pdf> (accessed 28 May 2011).

Notes

- ¹ The term ‘level of government’ refers to the part of the hierarchy through which state power is employed at a certain place in the vertical order of a country. Levels can be national, regional, or local.
- ² A ‘level of administration’ describes an institutional setting that supports administratively the implementation of governmental policies in the regions, at the local level, etc. It differs from a level of government as it does not make policies but only implements them.
- ³ The term ‘regional’ can refer (a) in an international or regional context, to a global region (e.g. Europe, East Africa, etc.), or (b) in a local or regional context, to the subunit between the national and the local level—synonymous with provincial or state.
- ⁴ Ghai, Y., ‘The Structure of the State: Federalism and Autonomy’, in International IDEA, *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm: International IDEA, 2003), pp. 155–68.
- ⁵ Brancati, D., ‘Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?’, *International Organization*, 60 (2006), pp. 651–85.
- ⁶ Article 24 of the Interim National Constitution of the Republic of Sudan (2005).
- ⁷ Article 2 of the Constitution of Tanzania (1977) as of 1995.
- ⁸ Since each Canton’s constitution regulates the administrative or governmental structure of the respective cantons, the Swiss Constitution does not mention the establishment of administrative levels.
- ⁹ Baechler, G., ‘Territorial vs Ethnic and Personal Federalism: Issues & Practices’ (2008), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/Document_Archive>.
- ¹⁰ Article 150 of the Constitution of the Republic of Benin (1990).
- ¹¹ Article 4 of the Constitution of the Kingdom of Belgium (1994) as of 2008.
- ¹² Article 2 of the Constitution of Malaysia (1957) as of 1994.
- ¹³ Article 53 of the Federal Constitution of the Swiss Confederation (1999) as of 2010.
- ¹⁴ Article 18 A/B of the Constitution of the Republic of Indonesia (1945) as of 2002.
- ¹⁵ Article X of the Constitution of the Republic of the Philippines (1986).
- ¹⁶ Harty, S., ‘Spain’, in Ann L. Griffith (ed.), *Handbook of Federal Countries* (Montreal: McGill-Queen’s University Press, 2005).
- ¹⁷ Article 72 of the Constitution of Germany (1949) as of 2010.
- ¹⁸ Article 94 A of the Constitution of Canada (the Constitution Acts 1867 to 1982, current consolidation) as of 2008.
- ¹⁹ Cf Ter-Minassian, T., ‘Intergovernmental Fiscal Relations in a Macroeconomic Perspective: An Overview’, in T. Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice* (Washington, DC: International Monetary Fund, 1997), p. 4.

- ²⁰ Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).
- ²¹ France (see above) has six different levels of government, four of which are listed in the Constitution. Aside from the national level, the Constitution only regulates one in detail.
- ²² Next to the national level, the Constitution of Peru lists regions, departments, provinces, and districts as tiers of decentralization and provides a whole chapter addressing detailed regulations. The Constitution of Greece provides in Articles 101 and 102 for ‘the Organization of Administration’, which indicates at least two levels of local government. South Africa provides for three layers of government in the constitution (national, provincial, and local government) that are quite extensively regulated. The local government itself is constitutionally subdivided into different classes of municipalities, thereby creating additional tiers of government. See also the Constitution of Mongolia (2000), Chapter IV, Articles 57–63, Administrative and Territorial Units and their Governing Bodies.
- ²³ Article 3 of the Constitution of Liberia states that Liberia is a unitary sovereign state divided into counties for administrative purposes.
- ²⁴ See United Nations Development Programme Somalia, ‘Federalism and Decentralization: Options for Somalia’, 2008, p. 10.
- ²⁵ Heywood, A., *Key Concepts in Politics* (New York: St Martin’s Press, 2000), p. 141.

Key words

Administrative decentralization, De-concentration, Delegation, Devolution, Political decentralization, Fiscal decentralization, Asymmetric decentralization, Level of government, Level of administration, Exclusive powers, Concurrent powers, Federal system, Unitary system, Integrated model, Separated model/dual model, Personal federalism, Internationalization/regionalization

Additional resources and further reading

- **Forum of Federations**

<<http://www.forumfed.org/en/index.php>>

The Forum of Federations, funded by the Canadian government, attempts to construct democratic governments by fostering federalist ideas. In seeking to disseminate knowledge among practitioners on a global scale, the website provides resources and training on issues of federalism and governance.

- **International Association of Centers for Federal Studies**

<<http://www.iacfs.org/index.php?page=1&lang=0>>

The International Association of Centers for Federal Studies (IACFS), composed of international centres and institutes, conducts independent research and produces publication about issues regarding federal systems. The IACFS website has resources that promote federalism as a form of government for practitioners, including publications, studies of recent developments in federalism around the world, and a global dialogue project that allows practitioners to share their experiences.

- **Center for Policy Alternatives**

<<http://www.cpalanka.org/>>

The Center for Policy Alternatives is a Sri Lankan organization that seeks to strengthen institutions and capacity building by disseminating and advocating policy options, conflict resolution, and democracy. It focuses on governance options for diverse South Asian states and produces documents relating to public policy alternatives.

- **Swiss Agency for Development and Cooperation**

<http://www.deza.admin.ch/en/Home/Themes/Rule_of_Law_Democracy/Decentralization>

The Swiss Agency for Development and Cooperation (SDC) seeks to promote a better relationship between civil society and local governments through political, administrative and fiscal decentralization in order to make government more responsive to people's needs by providing funding, education and institutional support. The website contains links relating to decentralization processes and the SDC's activities in assisting the development of civil society globally.

- **Institute of Federalism**

<<http://www.federalism.ch/index.php?page=22&lang=0>>

The Institute of Federalism is a centre for research and academic expertise that focuses on federalism and cultural diversity. Its website offers an international research and consulting centre that focuses on the peaceful creation of multicultural societies.

- Barnett, Camille Cates, Minis, Henry P. and VanSandt, Jerry, 'Democratic Decentralization', Research Triangle Institute (RTI International), December 1997, <http://www.rti.org/pubs/Democr_Decen.PDF>, an article examining the link between decentralization and democratic behaviour
- Horváth, Tamás M. (ed.), *Decentralization: Experiments and Reforms* (Budapest: Open Society Institute, Local Government and Public Service Reform Initiative, 2000),

<<http://lgi.osi.hu/publications/books/decentralization/EntireBook.pdf>>, an article examining different decentralization efforts in Eastern Europe

- Saunders, Cheryl, 'Federalism, Decentralisation and Conflict Management in Multicultural Societies', Forum of Federations (no date), <<http://www.forumfed.org/libdocs/IntConfFed02/StG-Saunders.pdf>>—an article examining the development of democratic, federalist governments in multi-ethnic and multicultural societies
- Thalmann, Urs and Widrig, Catherine, 'Contemporary Diversity versus Swiss Federalism', New Trends in Federalism Working Paper 2 (Fribourg: Institute of Federalism, 2004), <http://www.federalism.ch/files/documents/New_trends_in_federalism_WP2.pdf>

Glossary

Administrative decentralization	The degree of autonomy that governmental subunits possess relative to the central government in running governmental affairs. Forms of administrative decentralization are de-concentration, delegation, and devolution.
Asymmetric decentralization	An arrangement which distributes power unequally or differently to different regional governments
Concurrent powers	Powers that are shared by national and sub-national governments under a constitution. Where laws in an area of concurrency conflict, the national law is normally paramount.
Decentralization	The dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration, for example, at regional, provincial or local levels. Decentralization is thereby understood as a territorial concept. The three core elements of decentralization are administrative decentralization, political decentralization, and fiscal decentralization.
De-concentration	Occurs when the central government disperses responsibility for implementing a policy to its field offices without transferring authority.
Delegation	A mechanism under which the central government refers decision making and administrative responsibilities for various public functions to other levels of government on a revocable basis. The degree of supervision varies and might include substantial central control, or might fully allocate the administration and implementation of policy to subunits.

Depth of decentralization	A measure of the comprehensiveness of the actual powers that are transferred from the centre to lower levels of government
Devolution	The strongest form of decentralization that involves the transfer or shift of a portfolio of authority to regional or local governments
Enumerated powers	The powers explicitly established in the constitution. The governmental subunits have the residual power; therefore it is not necessary to specifically list the subunit's powers.
Federal system	A system of government made up of a federation of organizations or states which maintain their own independent powers but cede authority to a central federal government in certain defined areas. One level of government cannot unilaterally change the existing distribution of powers or exclusive competences at the sub-national level. Any alteration of authority between governmental levels requires the consent of all affected levels.
Fiscal decentralization	The extent to which governmental subunits are able to undertake fiscal responsibilities, such as revenue-raising and spending.
Integrated model	National courts and lower courts are integrated in one system. Courts have the power and the capacity to deal with both sub-national and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective sub-national law.
Internationalization	Upward transfer of powers from the national level to an international institution, for example, the United Nations, the Internal Criminal Court
Personal federalism	A system under which certain rights and powers are assigned not to a specific territory but to a group of people (communities) that are often not territorially concentrated but dispersed throughout the country
Political decentralization	The degree to which governmental subunits are able to undertake the political functions of governance such as representation
Regional integration	The upward transfer of powers from the national level to a regional institution, for example, the European Union (EU) or the Economic Community of West African States (ECOWAS)
Self-rule	Sub-national levels of government obtain the authority to regulate and/or implement certain issues on their own.

Separated/dual model	Both the national level and the sub-national level each have their own court system (usually three-tiered—local courts, circuit courts of appeal and Supreme Court). Lower courts generally only apply the laws of their respective states, whereas national law is adjudicated by national courts.
Shared rule	Sub-national entities are involved in national rule making.
Substantive decentralization	The assignment of authority and power to various levels of government. The substantive component of decentralization measures how the formal structure is actually filled with substantive authorities (sometimes referred to as functional decentralization).
Unitary system	A system in which one level of government can unilaterally revoke the existing distribution of powers, including exclusive competences at the sub-national level

About the author

Markus Böckenförde is currently the Leader of the Advisory Team to the Policy Planning Staff at the German Federal Ministry for Economic Cooperation and Development and Senior Researcher at the German Development Institute. From 2009 until April 2011, he was Programme Officer and in part Acting Programme Manager for the Constitution Building Programme at International IDEA, Stockholm. Before joining IDEA, he was the Head of the Africa Projects and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg, Germany (2001–2008). In 2006–2007 he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995 to 1997 he was research assistant to Justice Professor Helmut Steinberger, the German delegate to the Venice Commission (the Council of Europe’s advisory body on constitutional matters).

Dr Böckenförde holds a law degree and a PhD from the University of Heidelberg and a Master of Laws degree from the University of Minnesota as well as the equivalent of a Bachelor degree in political science (University of Freiburg). He has been involved in the constitution-building processes of Sudan and Somalia, working together with the relevant constitutional assemblies, and has been otherwise involved in the processes in Afghanistan and Nepal. He has published widely in the area of constitutional law and constitution building and is the co-author of several Max Planck Manuals used as training materials for Max Planck projects. He has worked as a consultant for the United Nations Development Programme (UNDP), the German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ; now the Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ), the German Foreign Office, the Konrad Adenauer Foundation and the Friedrich Ebert Foundation.

International IDEA at a glance

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.