



Summary

Federalism or devolution involves the organization of public power so that government, on at least two levels, is responsive and accountable to the people that it serves. More than 25 countries around the world operate as a federation of some kind. Many more devolve power in other ways, either across the country or in particular regions with special autonomy. This issue of **Constitutional *INSIGHTS*** explains why any change from a centralized to a federal or devolved system is a significant one. It also outlines some of the challenges that arise in the context of such change, and suggests options that might be available to meet them.

About this series

The Melbourne Forum on Constitution-Building in Asia and the Pacific is a platform co-organized by the Constitution Transformation Network and International IDEA.

It brings together scholars and practitioners of constitution building from across the region, to share their perspectives on critical issues, as a contribution to global understanding of the field.

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

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Implementing Federalism

Introduction

More than 25 countries around the world operate as a federation of some kind. Many more devolve power in other ways, across the country or in particular regions with special autonomy. Some of the older federations are well-established; India, Malaysia and Pakistan are examples. Others are much more recent, however. Many new constitutions provide for federation or some form of devolution. In Asia and the Pacific, for example, the new Constitution of Nepal establishes a federation, and federalism is under consideration in Myanmar, the Philippines and Solomon Islands.

Federalism or devolution involves the organization of public power so that government *on at least two levels* is responsive and accountable to the people that it serves. There are all sorts of reasons why countries and their peoples might find that arrangements like this offer benefits that a centralized system of government does not. Federations may be established to assist democratisation; as a way of resolving conflict; as a framework for self-determination; to disperse concentrations of power; to manage government in large countries; or for any combination of these or other reasons.

Any change from a centralized to a federal or devolved system is a significant change, however. This issue of Constitutional *INSIGHTS* explains why this is so, outlines some of the challenges that arise, and suggests options that might be available to meet them. In the interests of simplicity, it focuses on the implementation of new federal arrangements. Some similar issues arise, however, in implementing other forms of devolution or arrangements for special autonomy.

This issue of Constitutional *INSIGHTS* addresses four key questions:

1. What are the principal features of a federal form of government?
2. What is involved in implementing new constitutional arrangements?
3. What challenges might be expected in implementing new federal arrangements?
4. How can such challenges best be met?

1. What are the principal features of a federal form of government?

There is no one-size-fits-all approach to designing a federal system. While there are certain standard features of most federations, these can be designed in different ways to meet the circumstances, needs and preferences of each country and its peoples.

At least some older federations were formed by bringing states together. In the 21st century, however, almost all federations are formed by distributing power within a previously centralized state. The differences in these two approaches to creating a federation are driven by history and circumstance; they do not affect the federal character of the new arrangements that are established. Because the starting point is different, however, the way in which a federation is formed may affect both the design and the challenges of implementation. This issue of *Constitutional INSIGHTS* focuses on federations in which power is devolved within a previously centralized state.

Federalism divides power between two or more levels of government so as to provide a combination of self-rule (in the states or regions) and shared rule (at the centre). To achieve this, the following (at least) are needed:

1. a fixed number of states or regions with territorial boundaries and institutions of government;
2. a central level of government with institutions that reflect the federal character of the country;
3. a division of legislative, executive and (sometimes) judicial power between the two levels of government;
4. an independent body (usually a court) for resolving disputes that cannot be settled informally; and
5. a relationship between citizens and both levels of government that is democratic and respects rights.

All of these arrangements must work in practice for federalism to fulfil the purposes for which it has been designed.

2. What is involved in implementing new federal constitutional arrangements?

Implementation is the final phase of constitution-building in which new constitutional arrangements, including federalism, are put into effect. Implementation is critical. Without it, a constitution is only an agreement in principle, however well-designed and inclusive the process by which it was made.

It may be helpful to think of constitutional implementation as having three dimensions: technical implementation, interpretation and cultural change.

2.1. Technical implementation

Technical implementation involves passing legislation, establishing new institutions, making appointments and taking whatever other legal steps or policy initiatives the constitution requires. Where the constitution involves a move to federalism, this phase may require states or regions to be created as well.

Implementation is critical for effective constitution-building, including transition to federalism or any other significant form of devolution

2.2. Interpretation

All new constitutional provisions need to be interpreted, in order to be properly applied. Many questions of interpretation arise under a federal constitution, the most obvious of which is the meaning of the division of powers or of particular powers. The body that finally determines the meaning of the constitution is likely to be a court. Not all questions of interpretation reach a court, however. In practice, many others need to have a view about what the constitution means: governments and legislatures at both levels of government, administrative officers, the media, and the people themselves.

2.3. Cultural change

New constitutional arrangements require institutions and people to adopt new practices, new modes of behaviour, even new ways of thinking about the ways in which government works. The more extensive the shift, the greater the cultural change that is likely to be required. A move from a centralized to a federal system of government requires everyone to adapt to the idea that power is shared and that there are two levels of government, each of which is expected to be responsive and accountable to the people that it serves.

3. What challenges might be expected in implementing new federal arrangements?

It is not possible to anticipate all the challenges that might be encountered in implementing a new federal constitution. Some problems are commonly encountered, however, and are set out below.

3.1. Resistance by the centre

If federalism is introduced into a country that was previously more centralized, national institutions may find it difficult to adapt to new limitations on their own power and to accept that some aspects of government now are handled by the states or regions. Resistance may manifest itself in many ways:

There may be reluctance to surrender legislative powers now allocated to the subnational level, including by withdrawing from fields of legislative power or by setting up the administrative infrastructure necessary to manage areas of subnational responsibility. This difficulty may be greater still if officers in departments that once operated in the national capital now need to move to regional centres elsewhere in the country.

- There may be delay in establishing new institutions on which federalism depends; a body to assist with revenue-sharing is a possible example.
- Where new federal arrangements require consultation or co-operation between levels of government, consultation may in reality be purely formal, if it happens at all.
- Where new arrangements require central institutions to distribute particular tax revenues or a share of the revenue to states or regions, the distribution may not occur, or may be delayed, or may fall short of what is required.

- If power is divided in a way that authorizes states or regions to implement some central legislation, central institutions may try to micro-manage how this is done, intruding into sub-national responsibilities.
- If a constitution provides for central intervention in emergencies, emergency powers may be triggered even when this is not strictly necessary.

As these examples suggest, a wide range of different actors at the centre may prove resistant to change in ways that require attention in the course of implementation. They include governments, legislatures, political parties, courts and administrators. Civil society, the media and segments of the public at large may also find it hard to change assumptions and practices associated with the centralisation of power. Resistance may not be deliberate, but may be instinctive; an automatic reaction, driven by old ideas that have not sufficiently been re-thought. The problem may be exacerbated if government changes hands at the centre and the incoming government is less committed to federal devolution or not aware of what it involves.

3.2. Resistance or lack of capacity of subnational governments

Federalism depends on effective subnational governments. Where a federation is formed by devolution within a formerly unitary state, this may be particular challenge. In some cases, subnational units need to be created from scratch, although in others existing local divisions may be able to be adapted for the purpose. In either case, questions also may arise about the names or boundaries of subnational units.

In some cases, subnational constitutions need to be made, by some appropriate process unless (as sometimes is the case) the national constitution establishes the subnational institutions of government. In most cases, new institutions need to be established: governments, legislatures, and bodies of other kinds. Electoral systems need to be put in place. Administrative departments need to be established, or transferred from the centre, or both. Arrangements for the receipt and expenditure of public moneys need to be made, in the interests of accountability.

All of these steps are necessary, but not sufficient. Subnational institutions need to work; to deliver responsive government to the people in the area, who in turn need to hold them to account. This democratic relationship, between people and public institutions, is key to the success of a move to a federal constitutional system.

3.3. Uncertainty about the powers and responsibilities of each level of government

Federal constitutions divide legislative, executive and sometimes judicial power between the two levels of government. Nevertheless, in putting this into practical effect uncertainties may arise either about the meaning of the powers or how they apply in particular cases. This seems to have happened in Nepal where there has been some confusion about which level of government has power to do certain things, such as issue directions to complete an infrastructure project or maintain law and order

(Poudel 2018). Uncertainty about the powers and responsibilities of each level of government can lead to disputes between levels of government, duplication, and potentially unconstitutional exercise of powers.

3.4. Judicial interpretation

Federal constitutions divide power between levels of government in ways that are enforceable through law. If disputes arise, the body with final authority to interpret and apply the constitution usually is a court. Under a new federal constitution, the court may be an existing court or a specialist constitutional court established for the purpose. In either case, it will be necessary for judges to adapt their thinking to the demands of interpreting a federal constitution. This may be more difficult for judges who have previously worked with a unitary constitution but in either case, the challenge is significant.

The significance of judicial interpretation to implementation is suggested by the legacy of the Thirteenth Amendment case in Sri Lanka (regarding a devolved rather than federal arrangement). The Thirteenth Amendment to the Constitution was negotiated as part of a peace agreement to end conflict between ethnic groups within Sri Lanka and provided for the devolution of some powers to provincial councils. The Supreme Court interpreted the new provisions very narrowly to fit within the judges' understanding of the unitary Constitution of Sri Lanka, limiting the potential for effective devolution (Welikala 2017). This example is taken from a devolved rather than federal system, but nevertheless suggests the kind of difficulties that might arise as judges seek to implement a new arrangement.

4. How can such challenges best be met?

4.1. Anticipate challenges for implementation

The challenges of implementing new federal arrangements can be anticipated, well before a new constitution is finalized. The tasks of developing an understanding of how the new arrangements will operate should begin then. Preparation can begin for the reorganization of the administration. If subnational constitutions are needed, the process and timelines for settling these can be agreed in advance. The text of the constitution should be settled with implementation in mind. Provisions for transition should be carefully tailored to overcome obvious challenges to implementation. Any formal procedures to encourage and assist implementation may be included in the constitution as well (see section 4.2).

Ideally, questions about the number, boundaries and names of subnational units should be resolved in the constitution or by the time it comes into effect. In Nepal, the new federal Constitution of 2015 was amended a few months after it was promulgated to redraw some state boundaries, to redress concerns of the Madhesi peoples within Nepal. This dispute made it impossible to implement the new federal arrangements in the first months after the new constitution was made.

Early decision on these matters need not freeze the configuration of the subnational units for all time. As the example of India shows, it is

The challenges of implementing new federal arrangements can be anticipated, well before a new constitution is finalized

possible to reorganize boundaries and create new units after the federal system has been put in place, if the procedures for making such changes are flexible enough. Article 3 of the Indian Constitution empowers the national parliament to form a new state or alter the boundaries of an existing state in India, but the parliament must give the parliaments of the states concerned an opportunity to provide their views on the change. A formal constitutional amendment is not necessary. Since independence, new states have been created, often following linguistic or cultural affiliations of the people.

Questions about the distribution of power and resources should be resolved in or through the constitution as well. There can be some flexibility in these arrangements, to adjust power and resources through agreement in the future, but the essentials need to be put in place by the constitution itself and not left to the implementation phase. These issues are central to devolution, are likely to be contested and can be expected to be more difficult to resolve after the constitution comes into effect.

4.2. Formal implementation arrangements

Some constitutions include constitutional provisions that are designed to encourage and assist implementation. Options for this purpose include:

- Adding an ‘implementation schedule’ to the constitution, which lists the key items of legislation required to implement the constitution and identifying the date by which each law must or should be passed (see e.g. schedule 5 of the 2010 Constitution of Kenya).
- Creating incentives for the enactment of implementing legislation, for example by establishing a default set of principles that will come into effect, or political consequences (such as the dissolution of parliament) if legislation is not enacted within a fixed period.
- Creating an ‘implementation commission’ to monitor implementation and/or assist the process. Implementation may be understood widely for this purpose, to extend to public education about the new constitution. Bodies of this kind have been established in Afghanistan, Kenya and Pakistan, with varying effects.
- Establishing intergovernmental or independent bodies to mediate relations between levels of government in the exercise of their powers or the distribution of resources. Examples include the Finance Commission of India and the Pakistan Council of Common Interests.

Formal implementation arrangements may be useful to focus attention on the technical requirements for implementing federalism. However, there is some danger that, by emphasizing technical implementation, such arrangements will lead to other key aspects of implementation being undervalued. So, for example, a 2015 report on the status of constitutional implementation to the Kenya Law Reform Commission concluded that, while significant formal implementation had occurred, there were continuing challenges to ‘substantial realization of constitutional purposes’ (Report on the Status of Constitutional Recognition to the Kenya Law Reform Commission 2015: 75). There is also a risk that Implementation Commissions will shoulder the responsibility for all constitutional implementation and even take

on some of the functions of other agencies, rather than working cooperatively to support other institutions of government during a transitional implementation phase.

4.3. Transition to a new system

All constitutions make some provision for transition, to bridge the gap between the old and the new, often over a prescribed period. In some cases, an interim constitution assists with the process of transition as well.

In a move to a new federal constitution, a period of transition is important. Power, resources and, perhaps, infrastructure need to be transferred from one level of government to another. Institutions may need to be established and elections held. Provision needs to be made to ensure that existing laws continue, even after authority for making and changing them is transferred to another level of government (for an example see article 372 of the Constitution of India). This will all take time and trust between the levels of government that the transition will not be unduly delayed.

Different options for structuring a transition to federalism include the following:

- Engage in subnational capacity-building before the constitution comes into effect, as far as possible, so that power can be transferred quickly once the final constitution comes into effect.
- Provide for a shortish transition period, subject to interim arrangements, during which subnational institutions are put in place and other necessary steps taken so that power can be transferred on a fixed date.
- Provide for a staggered transition to federalism, once subnational unit capacity is adequately developed. In this case, it may be useful to create an independent procedure for monitoring the process or for resolving disputes over whether the requirements for the transfer of power have been met.

4.4. National ownership and popular support

Implementation of new federal arrangements will be easier if the process and outcomes are fully owned by political leaders and the people as a whole, as the constitution is made. National ownership in this sense means that the requirements of the new constitution are widely understood and that there is commitment to it, by political actors and the people to whom they will be accountable, at both levels of government. How this is achieved will vary between different federations. On any view, however, in a federal context, 'national ownership' requires involvement and commitment by political leaders and people in the regions that will become federated units as well as at the centre, and in the capital city.

Ultimately, support for a change to a federal form of government needs to come from the people, who hold government to account at both levels, to make federal democracy a reality. An adequately inclusive constitution making process should assist in this regard. Properly designed processes for public information and education, both before and after the constitution comes into effect, should assist as well. The challenge is to

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About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation.

<<http://law.unimelb.edu.au/constitutional-transformations>>

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Colophon

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translate abstract ideas such as federalism and the division of power into terms that the people at large can understand and actively support.

4.5. Preparation and training

Transition to federalism from a more centralized form of government affects the functions of a wide range of actors at both levels of government including legislators, administrators and courts. Preparation for the transition, through training or other means of introducing the requirements of the new system may be useful to assist stakeholders at all levels to understand what to expect, after the constitution comes into effect. Ideally, such activities should be problem-based, drawing on the terms of the new constitution, to demonstrate the issues that may arise, in the light of experience elsewhere, and to explore options for resolving them.

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