



Federalism

12

International IDEA
Constitution-Building Primer





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International IDEA Constitution-Building Primer 12

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1. Introduction



Federalism is a constitutional mechanism for dividing power between different levels of government so that federated units can enjoy substantial, constitutionally guaranteed autonomy over certain policy areas while sharing power in accordance with agreed rules over other areas. Thus, federalism combines **partial self-government** with partial **shared government** (Elazar 1987).

Federal systems are usually associated with culturally diverse or territorially large countries. Notable examples of federal countries (or countries with federal-like characteristics, sometimes referred to as ‘quasi-federations’) include Argentina, Belgium, Brazil, Canada, Germany, India, Malaysia, Nigeria, Pakistan, Spain, South Africa and the United States.

Advantages and risks

Federalism is a means of ensuring peace, stability and mutual accommodation in countries that have territorially concentrated differences of identity, ethnicity, religion or language. Federalism, especially in large or diverse countries, can also improve service delivery and democratic resilience, ensure decisions are made at the most appropriate level, protect against the over-concentration of power and resources, and create more opportunities for democratic participation.

However, while federalism has helped some countries settle conflicts or improve governance, it can also exacerbate existing differences, sometimes leading to deeper conflicts or state failure. Federalism is also a complicated, often legalistic, form of government, which can be expensive and can hinder the coherent development and application of policies.

2. What is the issue?



Federalism is a system of government that establishes a constitutionally specified division of powers between different levels of government. There are usually two main levels: (a) a national, central or federal level; and (b) a state, provincial or regional level. In some cases, however, a federal system may prescribe a three-fold distribution of power by recognizing the constitutional powers of local government (e.g. South Africa) or by creating complex forms of overlapping territorial and linguistic federalism (e.g. Belgium).

Federalism thereby allows distinct communities, defined by their territorial boundaries, to exercise guaranteed autonomy over certain matters of particular importance to them while being part of a larger federal union through which shared powers and responsibilities are exercised over matters of common concern.

To achieve this, the components of a federal system include, in addition to legislative and executive (and sometimes judicial) institutions at each level of government, a relatively rigid constitution that sets out the distribution of powers among the various levels of government and a supreme judicial body that is responsible for adjudicating disputes between them.

There are two main contexts in which federalism may be considered.

Identity federalism occurs when two or more culturally, linguistically, religiously or otherwise distinct national communities have enough commonality of interest or identity to make them want to live together in one polity, but enough distinctiveness of interest or identity to make them demand substantial autonomy within that polity (e.g. Canada, Switzerland).




Efficiency federalism occurs when a culturally homogeneous but geographically large nation wishes to improve democratic representation and accountability by decentralizing power and giving greater control over resources and policies to



local people while maintaining national unity and the ability to act coherently in matters of national policy (e.g. Germany, Argentina).

Federalism attempts to reconcile **a desire for unity and communality** on certain issues with **a desire for diversity and autonomy** on others (see Figure 2.1). The question of whether federalism is suitable for a given country (and, if so, what form federal institutions should take and to what extent the federal principle should be applied) therefore depends chiefly on the balance between common interests or identities, on the one hand, and divergent interests or identities, on the other.

Figure 2.1. Federalism as unity in diversity

Separate states	A unitary state	A federation
		
Diversity and autonomy without unity or communality	Unity and communality without diversity or autonomy	Diversity and autonomy within unity and communality

3. Advantages and disadvantages of federalism



The rationale for federalism

Federalism is offered as an institutional solution to the problems associated with scale and diversity.

Scale

The origins of democracy can be traced to ancient and medieval city states where citizens were able to participate directly in political life. Historically, it was thought that democracy was possible only in small states, where decisions were made through face-to-face discussions in the town square. The development of representative institutions enabled democracy to be practised on the scale of the nation state, but the problem of scale still remained.

Increasing the size of the political unit has a number of consequences. As the geographical distance between the government and the people grows, the more difficult it becomes for the people to make their voices heard, the more elites at the centre begin to dominate the political process and the less likely it becomes that the rulers will understand the needs, aspirations and priorities of the people. This can lead to unpopular, inappropriate and unworkable policies, as well as to a sense of alienation and frustration that can damage the reputation of the political system as a whole. Federalism can help resolve this problem, since it enables substantial powers to be exercised at the state or provincial level, in order to give people greater opportunities to exercise democratic control and to tailor policies to their own needs, while entrusting to the centre only those powers that need to be handled centrally.

Diversity

One of the main benefits of federalism is that it provides a framework for the **recognition** of ethnic, religious, linguistic or other cultural communities, reflecting their desire to be recognized as a people with a distinct identity and particular interests. By guaranteeing substantial **autonomy** to such groups, federalism can allow them to exercise partial self-government through state, provincial or regional institutions while still sharing certain functions with other communities through federal or national institutions. By satisfying demands for autonomy and recognition, a federal constitution may protect minorities, prevent conflict, increase the legitimacy of democratic institutions and reduce pressure for secession.

However, federalism (at least as it has traditionally been understood and practiced) is appropriate only where these communities are territorially concentrated; if ethnic, religious or linguistic communities are not concentrated in particular geographical areas, other ways of combining self-rule with shared rule might be preferable (see section 10 of this Primer on possible alternatives to federalism).

Federalism is therefore ‘suitable for some countries, [but] not all’ (Anderson 2008: 12). Small and homogeneous countries, if viable as independent units, will generally have little reason to consider federalism. In a large country, or one with distinct territorially concentrated minorities, federalism is likely to be high on the agenda.

Coming together and holding together

Historically, small states that were confronted by common enemies or existential challenges would sometimes come together in unions, leagues or confederations that were bound together by a treaty or founding agreement. This would enable these states, without sacrificing autonomy in most aspects of domestic policy, to share certain powers and functions, particularly in relation to foreign affairs, defence and trade. In several respects, however, these early unions were more like today’s intergovernmental organizations than modern federal countries. Their confederal assemblies were conventions of delegates from the states, not truly national parliaments.

The United States, under the Articles of Confederation (1781–89), was initially such a loose union. Congress had no direct ability to levy taxes and was dependent upon the state governments to execute its decisions. In response to these shortcomings, the US Constitution created a new type of federation that was able to produce a more cohesive union while still respecting the reserved rights of the states in many domestic matters. Enacted in the name of ‘We the people’ (not ‘We the peoples’), this new Constitution was not a treaty between

sovereign states but the constituent act or fundamental law of a new, composite, federal state. The federal government did not derive its powers from the states but directly from the people of the United States as a whole. Under it, US citizens would be subject to two overlapping authorities—the federal and the state governments—each having direct legislative power in their respective constitutionally prescribed spheres of competence. This created the model from which all subsequent federal systems have been (directly or indirectly) derived.

Through successive waves of democratization, federalism has spread around the world. Federal systems can now be found in emerging and consolidated democracies; in common- and civil-law jurisdictions; in countries with presidential, semi-presidential and parliamentary executives; and on every inhabited continent. As federalism has spread, and as the number of names by which federalism is known has grown (see Box 3.1), it has increasingly been used as a means by which an existing state can decentralize power and, as such, has become a tool for holding large or diverse countries together in the face of autonomist or secessionist pressures. Thus we see two approaches to federalism: a ‘coming together’ federalism in which formerly independent countries unite into a federal state, and a ‘holding together’ federalism in which a formerly unitary state seeks a federal solution to the problems of scale and diversity.

Box 3.1. A note on terminology

Federal systems do not always use the term ‘federal’ to describe themselves. The federal level may also be known as a ‘national’, ‘central’ or ‘union’ government. Constituent units may be known by a variety of names, including ‘states’ (Australia, Malaysia, USA), ‘provinces’ (Argentina, Canada, South Africa), ‘regions’ (Belgium, Italy), ‘cantons’ (Switzerland), ‘autonomous communities’ (Spain) or ‘Länder’ (Austria, Germany). These differences in terminology do not necessarily correspond to any particular formal models of federalism or to the substantive distribution of powers.

In this Primer, the terms ‘constituent unit’ and ‘subnational unit’ are used interchangeably as a generic descriptor for such entities. Some such entities claim a distinct national identity or have a recognized national status, and the use of the term ‘subnational’ is not to be read as implying a denial of any such claim or recognition.

Other potential advantages of federalism

Federal government is rooted in constitutionalism and pluralism

Federalism requires power-sharing between federal institutions and those at the subnational level, such that neither level of government has absolute power. A well-functioning federal system is by definition constitutional and pluralist, since it is based on discussion and negotiation between balanced centres of power and the recognition of minorities under a broad framework of agreed constitutional rules.

According to Filippov and Shvetsova:

. . . successful federalism requires all of its benefits: well functioning democratic institutions, [a] judicial system, integrated national political parties and appropriate electoral incentives created by democratic political competition. The basic finding of the literature is that only in well functioning democracies can federalism be a stable and effective form of government. And conversely, outside of the democratic context, federalism is ultimately an unstable form, which logically progresses either to territorial disintegration or to becoming a mere constitutional formality (2013: 167).

The power-sharing base is broadened

Federalism allows political groups that are minorities on the federal or national level to hold office at the state or provincial level. This can have a beneficial effect in promoting political inclusion and a balance of power in countries with a dominant party at the national level. In South Africa, for example, the African National Congress party has won large majorities at every national election since the transition to democracy in the 1990s, but the opposition Democratic Alliance has enjoyed power in the Western Cape Province. The broader base of office-holding at subnational levels may also provide greater opportunities for women, ethnic minorities, poor people and other traditionally under-represented demographics to be elected to office.

Innovative and pragmatic approaches to policy development are encouraged

By allowing subnational units to develop their own policies to meet their own needs, federalism can promote innovation and experimentation in policymaking, enabling states or provinces to pioneer innovative policies that would not be politically viable at the national level. In 2006, for example, the US state of Massachusetts was able to establish a quasi-public health insurance system that

greatly expanded access to medical care for low-income citizens despite the absence of such a provision at the national level.

The burden on central authorities is reduced

Federalism frees the central government from having to handle much of domestic administration and service delivery, enabling it to focus on strategic challenges and national priorities.

Resources are shared across geographical space

Federalism is a way of ensuring the wider distribution of public resources through revenue sharing and other forms of fiscal arrangements that guarantee an agreed share of resources to all areas of a country. Federalism may also encourage more geographically diverse economic and social development, in contrast to a unitary state where everything—money, power, culture—gravitates to the capital.

Capacities and democratic responsibilities are developed

State, provincial or regional institutions provide a useful training ground for citizens, representatives and public officials. In a centralized country, politics takes place in the capital, and those who are far removed from the capital have few opportunities to participate in holding office and making decisions; in a federal country, many more people have the opportunity to participate in public life.

Potential disadvantages of federalism

Duplication of work and lack of coherence

Federalism can duplicate government functions and lead to the delivery of overlapping or contradictory policies at different levels of government. Although constitutions often attempt to specify which level of government has primacy in each area of policy, many policies cut across these functional boundaries or can affect other policies in unpredictable and undesirable ways. As a consequence, the responsibility of each level of government for policy outcomes and service delivery may be hindered by the actions or inactions of other levels of government. It can become difficult for citizens to know where responsibility lies and to use this information to hold public officials to account.

Additional operating costs

Maintaining multiple levels of government is expensive. More public institutions means higher costs for offices, staff, salaries and allowances, and meeting these costs may place a heavy burden on the treasury of a less economically developed country.



Increasing regional discrepancies of wealth, resources and outcomes

Unless an effective mechanism for revenue sharing is in place (requiring richer states or provinces to subsidize poorer ones), federalism can lead to increased inequality between subnational units because of their different natural resources or other revenues or levels of development. Federalism may also cause a widening disparity of outcomes in terms of the provision and quality of public services.

Harmful economic competition between subnational units

A related point is that if the unit of social and economic regulation is smaller than the unit of free trade and of capital movement (e.g. if working conditions or environmental regulations are determined by subnational units), then a 'race to the bottom' might result, as subunits compete to attract capital by lowering wages and costs. This can undermine solidarity and make it more difficult to pursue economically progressive policies.

Judicialization of politics

A strict constitutional division of power between levels of government may result in an increased political role for the judiciary, as disputes between the competences of national and subnational institutions are resolved in the courts rather than through elected legislatures. In all democratic countries it is necessary to maintain a careful balance between the independence and neutrality of the judiciary, on the one hand, and the responsiveness and inclusivity of the judiciary on the other, but in federal countries striking such a balance is particularly important.

Potential exclusion of minorities

While federalism can provide opportunities for autonomy and recognition for cultural minorities, it can also expose minorities within constituent units to discrimination and oppression, particularly if states/provinces/regions are established on ethnic, linguistic, cultural or religious lines but contain within them minorities belonging to different groups. A strong central government, on the other hand, may protect such locally concentrated minorities and ensure the equal protection of the law.

The strengthening of local elites who misuse power

Powerful interests can misuse subnational governments for private gain at the expense of the common good. Corruption, always difficult to eradicate, may be especially hard to tackle at the state, provincial or regional level, where it may be embedded in local networks and take place far from the eyes of national anti-corruption authorities. In situations where many voters are economically or socially dependent on local elites (for example, because those elites control access

to employment, land or other goods), the greatest challenge is to ensure that decentralized government is decentralized democracy, and not decentralized oligarchy or autocracy.

Ineffective governance because of a lack of capacity

Subnational governments may be ineffective owing to a lack of the human and financial resources necessary to fulfil their functions. Constitution-makers should be aware of the risk of overburdening weak and newly established governing institutions with demands that they cannot meet—to do so would risk disillusionment, distrust and discontent.

Instability and threats to democracy

The multiple centres of power associated with federalism may have a destabilizing effect and can, in the absence of a consolidated democracy, create additional risks of conflict. While federalism may satisfy demands for autonomy and thereby diminish the desire for secession, it may also provide an institutional platform for secessionist demands. These demands, if not accommodated through a further transfer of powers, could result in a destabilizing and potentially violent secession or to anti-democratic measures in order to suppress secessionism.

Think Point 1

Considering the advantages and disadvantages of federalism, how can a federal constitution help ensure that the advantages are maximized and the disadvantages minimized?

4. Distribution of powers



To address the substance (rather than the form) of federalism, it is necessary to look at the way in which specific powers are assigned to, and exercised by, different levels of government.

Distribution of legislative powers

Lists of legislative competences

In most federal systems, the federal constitution divides powers between the federal institutions, on the one hand, and the constituent units of the federation, on the other, according to one or more lists of legislative competences that are specified in the constitution (either in the body of the constitutional text or in schedules at the end of the text).

In some countries, such as Argentina, Australia, Pakistan (since the 18th amendment) and the United States, there is only one list: a list that enumerates the policy areas over which the federal institutions have authority. Everything not explicitly granted to the federal authorities in this list remains, in principle, the preserve of constituent units.

In other countries, such as Canada, there are two lists: a list of the powers specifically vested in the provinces and a list of the powers explicitly granted to the federation. In the Canadian case, residual power rests in the federation—in other words, everything is in principle a federal matter, whether it appears on the federal list or not, unless it is explicitly declared to be a provincial matter.

There may also be list of concurrent powers, as found in India, Nigeria and South Africa, over which both the federal and the state/provincial authorities may legislate. In case of any conflict between them, the usual practice is for the federal legislation to prevail over state/provincial legislation:

- South Africa has two lists: one (schedule 4) enumerating the exclusive powers of the provincial authorities and the other (schedule 5) enumerating the concurrent powers shared between the provincial and national authorities.
- India has three lists: a Union List (schedule 7, list I) enumerating the exclusive powers of the central legislature, a State List (schedule 7, list II) enumerating the exclusive powers of the state legislatures and a Concurrent List (schedule 7, list III) enumerating the areas of shared authority.

In general, enumeration of concurrent powers represents a more integrated and flexible model of federalism, in which there are shared competences. It allows for pragmatic variation in the actual distribution of functions and powers between different levels of government, since the federal or central government can legislate for a particular area of policy without denying the right of the state or provincial level to legislate in that area to the extent that it is practicable and convenient to do so.

Supremacy

If a constitution makes provision for concurrent powers, it must also—to avoid conflict or legal uncertainty—specify which level of government has supremacy in the event of any incompatibility or conflict between them. If supremacy rests with the national or federal level (e.g. as in Germany and India), then the area of concurrent legislative authority is essentially that which the federal legislature chooses, by non-intervention, to leave to the states; at any time, the federal level can intervene to impose its will over concurrent matters. On the other hand, if supremacy rests with the states, provinces or regions (which is rare, but was found, for example, in the 2005 Constitution of Iraq), then concurrent authority is that which the subnational legislatures choose to leave up to the federal or national legislature; at any time, the subnational legislatures may reclaim power from the centre and assert their own legislative authority over a concurrent matter.

Residual powers

Since not every possible policy area can be provided for, a constitution must also specify where residual, or unspecified, powers lie. In so-called ‘coming together’

federations, residual powers are typically retained by the constituent states or provinces (e.g. US), while, in ‘holding together’ federations, they are usually vested in the national or federal level (e.g. India) (Anderson 2008: 26).

Transfer of legislative competences

Lists of competences, even if provision is made for concurrent lists, are static. To reflect the needs of changing societies and variable political circumstances, some federal systems make provision for the limited transfer of powers by statutory means between levels of government. The Indian Constitution furnishes several examples of such provisions:

- Any two or more states may, by resolutions of their state legislatures, confer powers that are on the State List to the central parliament, which is thereby empowered, on a permanent basis, to regulate that matter, in relation to those states, by means of national legislation (Constitution of India, article 252).
- The upper house of parliament (which is indirectly elected by the state legislatures) may, by a two-thirds majority, pass a resolution authorizing the parliament to legislate with respect to matters on the state list, thereby extending, almost without limits, the scope of central legislative power; however, such a resolution remains in force for one year only (but may be renewed indefinitely), and laws enacted under this provision lapse six months after the end of the period during which the resolution is in effect (Constitution of India, article 249).

Distribution of executive powers

It is usual for the distribution of executive powers to mirror the distribution of legislative powers, such that the federal executive is responsible for administering programmes and enforcing laws that are enacted by the federal legislature, while subnational executives are responsible for administering and enforcing laws enacted by subnational legislatures.

In some cases (e.g. Germany), however, federal executive powers are narrower than federal legislative powers, such that state/provincial executives are responsible for implementing and enforcing federal laws in some policy areas. If well handled, this arrangement can provide unity in legislative frameworks while allowing discretion to the states over priorities in implementing laws.

Which powers should be exercised at which level?

In almost all cases, the federal authorities have sole responsibility for matters such as defence, foreign policy, citizenship and immigration, and macro-economics (such as currency and foreign trade). Beyond this, the extent to which powers are distributed between different levels of government varies considerably (see Table 4.1). A general trend is for more recent federal constitutions to grant more powers to the federal level, consistent with an expanding role for government in modern societies (Irving 2008: 68). In some ‘holding together’ situations, however, a reverse trend is evident, as divergent regions have sought to expand their powers at the expense of federal or national authorities (e.g. Belgium, Spain). In practice, much depends on the degree and intensity of demand for decentralized powers and on the negotiating strengths of each side.

Aside from a struggle for power and resources, some criteria must be employed to assess whether the constitutional distribution of powers between different levels of government is acceptable and practicable. Subsidiarity is an orientating principle that has been widely—although not universally—accepted as a guide to finding a good balance. Subsidiarity requires that ‘a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good’.

In other words, subsidiarity makes a presumption that powers should rest with the state, provincial or regional bodies, which should be free to act autonomously. However, simply acquiescing to every demand for autonomy would not necessarily produce good government or sustainable outcomes. To avoid economic instability, for example, the federal government might need to retain certain expenditure responsibilities that particularly affect aggregate demand or that fluctuate with the economic cycle, such as unemployment benefits. There are also situations where the use of a power by one state, region or province could seriously disadvantage or prejudice another (e.g. in the fields of environmental protection or interstate water management), as well as situations where it makes sense for cooperation to extend over internal boundaries in order to achieve common goals (in the co-financing and maintenance of trunk roads and other infrastructure projects). Likewise, a public expectation of minimum standards throughout the country covering public services, such as health and education, might lead to a reasonable call for national regulation of those services. In these and similar cases, the principle of subsidiarity may justify allocating powers to the federal level.



Table 4.1. Distribution of powers in selected federal (or quasi-federal) countries

Power	Australia	Canada	Malaysia	Nigeria	Pakistan	South Africa
General administration						
Foreign affairs	Federal	Federal	Federal	Federal	Federal	Central
Defence	Federal	Federal	Federal	Federal	Federal	Central
Police	Shared	Shared	Federal	Federal	Units	Central
Fire and rescue	Units	Units	Federal	Shared	Units	Units
Criminal justice	Shared	Units	Federal	Shared	Units	Central
Civil justice	Shared	Shared	Federal	Units	Units	Central
Elections	Shared	Shared	Federal	Shared	Federal	Central
Education						
Primary	Units	Units	Federal	Units	Units	Shared
Secondary	Units	Units	Federal	Shared	Units	Shared
Vocational	Shared	Units	Federal	Units	Units	Central
Universities	Shared	Units	Federal	Shared	Units	Central
Health and welfare						
Family welfare	Units	Units	Federal	Unspecified	Unspecified	Central
Social security	Federal	Units	Federal	Unspecified	Units	Central
Primary care	Shared	Units	Federal	Units	Units	Shared
Hospitals	Units	Shared	Federal	Shared	Units	Shared
Public health	Shared	Shared	Federal	Units	Shared	Shared
Transport, infrastructure and facilities						
Highways	Shared	Shared	Shared	Shared	Units	Shared
Urban roads	Units	Units	Units	Shared	Units	Units
Ports	Units	Federal	Federal	Federal	Federal	Central
Airports	Federal	Federal	Federal	Federal	Federal	Central
Electricity	Units	Units	Units	Federal	Shared	Units

Power	Australia	Canada	Malaysia	Nigeria	Pakistan	South Africa
Environment and sanitation						
Housing	Units	Units	Shared	Shared	Units	Shared
Town planning	Units	Units	Shared	Units	Units	Units
Water and sanitation	Units	Units	Federal	Units	Units	Units
Environmental protection	Shared	Shared	Federal	Units	Shared	Shared
Consumer protection	Shared	Shared	Unspecified	Shared	Units	Central
Economic powers						
Agriculture, forests and fishing	Shared	Shared	Shared	Federal	Units	Central
Trade and industry	Shared	Shared	Shared	Shared	Shared	Central
Tourism	Shared	Shared	Shared	Shared	Shared	Shared

Source: Adapted from Commonwealth Local Government Forum, *Commonwealth Local Government Handbook 2013/14* (London: Commonwealth Local Government Forum, 2014).

Notes: This table indicates the levels of government at which policy delivery is principally handled. This may differ from the distribution of legislative power. Attribution of a power to the state/provincial level does not necessarily exclude further decentralization to local authorities.

To make these choices wisely, it is necessary to consider the degree and types of autonomy that the subnational units seek, and to understand the reasons why they seek it. For example, where federalism is a response to cultural diversity, there will usually be a demand for education, language laws, broadcasting and matters of cultural policy to be handled by the states, provinces or regions, while there might be a general willingness to allow aspects of economic, fiscal and welfare policy to be centralized. Conversely, if, in a culturally homogeneous society, federalism arises from the desire for more local control over the distribution of resources, these positions are likely to be reversed.

Socio-economic effects of the distribution of powers

Constitutions vary in the extent to which powers over the economy, public services and social security programmes are formally centralized. For example, the US Constitution makes no provision for social security, poverty relief, employment law, health care, public education, transportation or environmental policy to be determined at the federal level; these are all the domain of the states. To the extent that the US Government is involved in these policy areas at all, it is usually through the elastic application of its power to 'regulate interstate

commerce' or through conditional fiscal transfers to the states. This is a clumsy and inefficient arrangement which makes it difficult to adopt national policies or ensure uniform outcomes. Moreover, although the courts have generally allowed the federal government broad latitude to act in this way, it has resulted in some policies and programmes being contested in the courts.

In Australia, in contrast, the Constitution was amended in 1946 to grant the federal parliament the power to enact laws with respect to 'invalid and old-age pensions'; 'the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services . . . benefits to students and family allowances' (art. 51, xxiii and xxiiiA). This means there are no constitutional obstacles to developing national policies in these areas.

Because constitutions, in addition to defining legal rules, are political documents that signal intent and express identity, the explicit recognition that the federal government has responsibility for public services, social security and welfare policies may strengthen the political case for the extensive exercise of federal power in these policy areas in order to raise national standards.

Development and availability

Constitutional designers cannot always successfully prescribe or predict how the distribution of powers will develop over time. For example, Canada was intended to be a rather centralized federation, with all powers being exercised at the federal level except for those few that were specifically reserved for the provinces. The USA was intended to be a decentralized federation, with the bulk of power reserved for the states. However, the histories of these two countries have diverged from their framers' intentions. The USA has become more centralized over time, while Canada has developed stronger provincial autonomy. This variation is, in part, due to judicial decisions, but it is also due to circumstantial considerations, such as the fact that the USA had a civil war over the issue of secession while Canada did not, that the USA became a military superpower while Canada did not and the fact that Canada contains a major, territorially-concentrated cultural-linguistic minority whereas the USA does not.

The party system—in terms of the number, relative strengths, ideological polarization and internal organization of political parties—can also influence the development of federalism in ways that are difficult for constitution-builders to prescribe or predict. If parties are organized and led on a national/federal level, such that regional/state/provincial parties act as branch offices of the national party, and if the same set of parties are electorally competitive in different parts of the country, then parties may act as important channels of unity, interest aggregation and policy coordination. If, however, parties are loosely organized and dominated by subnational leaders, or if the electoral strength of different

parties varies widely between different parts of the country, then those in power at the subnational level may seek to use their powers in order to restrain, counteract, frustrate, or simply steer a different course from, the national government. Thus, within the same institutional structures, subnational institutions may have minimal or maximal approaches to the use of their powers, and may have cooperative or conflictual relations with the national or federal government, depending on the partisan composition of the majorities at each level.

This may seem discouraging, since no constitutional agreement can be definitive, but it also means that (a) federal systems can respond to changing needs; and (b) those who do not get everything they want from the decentralization provisions of a constitution at the outset can still pursue their goals through the constitution as it is applied and adjudicated in future. A federal constitution, in other words, provides a secure basis for the negotiation of powers between institutions over time.

Competitive versus cooperative federalism

A distinction is sometimes made between competitive and cooperative modes of federalism. In competitive federal systems, national and subnational institutions regard themselves as fundamentally distinct institutions, overlapping in territorial jurisdiction but occupying separate legal spheres; in principle, each gets on with its own business while ignoring the other. In cooperative federal systems, national and subnational institutions regard themselves as partners in government, sharing powers for the common good; the states or provinces have extensive involvement in the formulation of federal policies, on the one hand, while the federal government relies on the states for the implementation of its policies, on the other. A typical instrument of cooperative federalism, for example, is the framework law, whereby the federal legislature lays down basic goals and principles for a policy area and then allows the states to implement these in their own ways.

However, while there are important structural and constitutional differences between these types, these differences should not be exaggerated. As shown above, forms of informal cooperation exist even in competitive federal systems, while competition over powers and resources is found even in cooperative federal systems.

5. Asymmetrical federalism



Symmetry and asymmetry

Asymmetrical federalism is a form of federalism in which different parts of a country's territory have different degrees of autonomy. It can be contrasted with symmetrical federalism, in which all subnational units have equal juridical status and powers. Asymmetry is usually—although not necessarily—a product of 'holding together' federalism. When independent states are coming together to form a federation, they usually do so on equal terms, but when an existing country is dividing itself into federalized components in order to accommodate desires for autonomy, it often has to accommodate different parts of the country to different extents, depending on the different intensities of separate identity or interest, rooted in cultural, historical or geographic particularities.

- In Spain, a distinction was made between so-called 'historical' regions—those with a history of self-government and, often, a distinct linguistic identity—and other parts of the country, with additional powers being granted to the historical regions but not to the other regions. For example, the Basque Country and Navarra have particular rights in regard to the levying and collection of their own taxes, while Catalonia has its own police force, which has largely replaced the Spanish state's national police and Civil Guard forces. Some, but not all, of the regional autonomous communities have their own co-official language.
- In Canada, the Constitution recognizes various small asymmetries, since 'a number of [constitutional] provisions apply only to one, or more provinces, but not all. Many of these provisions address the

accommodation of minority groups, linguistic minorities in general, and the circumstances of Quebec in particular' (Bodnar 2003).

Asymmetry may also be a response to differences in capacity for autonomy. A poor or less developed area may have a lower capacity for self-government than a prosperous one, and may be more heavily dependent on transfer payments from other parts of the country via the central government.

Government of territories and dependencies

Another form of asymmetry occurs when a federal country has territories that belong to the federation but are not constituent units of it.

- Canada consists of 10 provinces and three territories. The provinces are full members of the federation. The territories belong to Canada, and are governed as part of Canada, but they are not members of the federation. Unlike provincial legislatures, the powers of territorial legislatures are not regulated in the Constitution but rather in ordinary federal statutes, and the consent of the territories is not required for the approval of constitutional amendments.
- India consists of 29 states and seven Union Territories. The states are members of the union (Constitution of India, article 1), while the Union Territories are parts of India but not part of any state.

The distinction between the constituent units of a federation and the territories of a federation usually arises because the territories are deemed unsuitable, in some way, for full membership of the federation, usually because they have a very small population, low governance capacity and a lack of fiscal resources (e.g. the Cocos (Keeling) Islands in relation to Australia). Lands that have been obtained by a federal country as a result of war might be governed as territories rather than integrated as members of the federation (e.g. Puerto Rico in relation to the USA).

Although most territories belonging to democratic federations have some form of representative government for local affairs, the citizens resident in territories may have fewer political rights than their co-citizens resident in the constituent units. In the USA, for example, representation is structured through the states, so US citizens resident in a territory would not be represented in the US Congress (except by a non-voting member). However, this is not an inevitability; in Canada, voters in territories are in fact slightly over-represented in proportion to their share of the total population in the lower house of the national parliament.



Capital territories

Many federations establish a separate capital territory where the federal capital is located (e.g. Canberra, Australia; New Delhi, India; Abuja, Nigeria; the District of Columbia, USA). The creation of a capital territory has several advantages. First, it asserts the neutrality of the federal capital in relation to the constituent units, thus helping, for example, to avoid allegations of favouritism in the distribution of federal funds. Second, it protects the personnel and institutions of the federal government from the potential risk of interference by any state government under whose jurisdiction they might otherwise fall.

The establishment of a capital territory, distinct from the capital of any constituent unit, and geographically removed from the capital of the former unitary state, may also serve as a clear signal of the government's commitment to the (physical and geographical) decentralization of power. The degree of autonomy granted to capital territories varies. In the District of Columbia, all laws are directly made by the US Congress, while local administration is in the hands of an elected mayor and city council. In contrast, Delhi, the Indian National Capital Territory, has (since the 69th Amendment) a form of government closely resembling an Indian state, with an elected legislative assembly and chief minister exercising state-like powers.

6. The boundaries of constituent units



In defining the territorial boundaries of constituent units, it is necessary to balance diverse and often contradictory needs, as shown in Table 6.1. Trying to achieve this balance in a way that is broadly agreeable to all major political actors can be one of the most difficult aspects of the constitution-building process.

How much discretion do constitution-builders have?

In some cases (particularly in ‘coming together’ federations where pre-existing states wish to retain their existing boundaries or where territorial boundaries are constrained by peace agreements after a conflict), constitution-makers will have little discretion over the determination of boundaries; in such cases, constitution-makers might have to accept boundaries that are not necessarily rational from an economic or administrative point of view, and will have to accommodate these realities in the design of the constitution. Such accommodation may include, for example, a provision for fiscal transfers that support the economies of poorer subnational units or a provision for the asymmetrical distribution of powers in recognition of very different capacities and levels of development.

In other cases (such as when federalism arises in a relatively homogeneous country as a response to the perceived over-centralization of power), there might be an opportunity to redraw boundaries along lines that are more practical from an economic or administrative point of view, e.g. to ensure broad equality of wealth and population size among constituent units.



Table 6.1. Factors to be considered in drawing the boundaries of constituent units

Area	Factors
<i>Economic affairs</i>	Efficiency, effectiveness, viability (an argument for avoiding many small or economically poor units) and grouping economic regions
<i>Socio-cultural affairs</i>	Nationality, ethnicity, language, religion, tribe and clan
<i>Geographic features</i>	Natural boundaries including rivers and mountains
<i>Political balance</i>	May mean breaking up one or more dominant regions, or a region that may have separatist tendencies, or avoiding a structure with just two or three units (that are often characterized by divisive politics)
<i>Public opinion</i>	May be assessed through elections, referendums or public consultations
<i>Historic boundaries</i>	Which people often identify with, and which can serve as a useful reference point and obviate the need for detailed consideration of other factors in drawing boundaries

Source: Anderson, G. and Choudhry, S., 'Constitutional Transitions and Territorial Cleavages', International IDEA Working Paper, June 2015, <<http://www.idea.int/publications/catalogue/constitutional-transitions-and-territorial-cleavages>>, accessed 28 July 2017

Should boundaries reflect cultural communities?

In some countries, the success of the constitutional process will depend on granting autonomy and recognition to ethnic, linguistic, cultural or religious communities, and, in such cases, there may be a strong presumption in favour of drawing boundaries along lines that reflect these communal identities. However, this approach may be difficult in practice: just about any attempt to draw boundaries along strictly cultural lines will result in enclaves, exclaves and incoherent boundaries, and the resulting units might vary widely in size, level of development, access to resources and capacity for self-government. Moreover, culturally determined boundaries might also reinforce communal identities, inflame communal rivalries over access to power and resources, leave minorities within minorities isolated and exposed and result in increased pressures for secession. This is not to say that demands for territorial boundaries to be drawn along communal lines should be rejected, only that (a) the difficulties of this arrangement should not be ignored; and (b) these demands should be balanced against other factors in the determination of boundaries.

Should a constitution specify boundaries?

It is not always necessary for territorial boundaries to be specified in a constitution. Instead, they can be determined by sub-constitutional means, such as by ordinary legislation or by organic laws. This may be a solution to the problems outlined above, or at least a way of postponing the resolution of such problems so that they do not derail constitutional negotiations. It also allows for future changes in population distribution or other demographic considerations to be accommodated without needing a constitutional amendment.

For example, federalism in India was not the product of a compact between previously independent states, but an attempt by the Constituent Assembly to establish a system of multi-level government that would be effective and responsive to the needs of a large country containing a plurality of ethnic, linguistic, cultural and religious identities. In the Constituent Assembly, there was a disagreement between those who wished to redefine state boundaries on communal (mainly linguistic) grounds and those who wanted to retain the existing colonial-era boundaries, which meant states would be linguistically mixed. As a compromise, the existing boundaries were retained at the outset, but the national parliament was empowered by the constitution to unilaterally alter the boundaries of states. The state legislatures must be formally consulted, but their consent is not required. This provision has since been used to mitigate tensions by bringing state boundaries more closely into harmony with cultural and linguistic boundaries (Anderson 2008: 20). In the Assam region, for example, ethnic tensions have been eased—although not resolved—by the redrawing of boundaries and the splitting of that state into several new, smaller states. However, this substantially weakens the federal nature of such a system, since, if the states cannot control their own borders, they will be highly dependent on the goodwill of the central authorities for their very existence.

In Spain, the Constitution (article 143) allowed existing ‘bordering provinces with common historical, cultural, and economic characteristics, the island territories, and the provinces with a historical regional unity’ to accede to self-government and constitute themselves as autonomous communities. This approach, as in India, allowed for flexibility and prevented the constitution-building process from stalling on the definition of boundaries. Unlike in India, however, the localities themselves constitute the boundaries of autonomous communities through their own voluntary and mutual actions, and these boundaries cannot be unilaterally amended or imposed by the central legislature.

7. Institutions of government within constituent units



Subnational constitutions and institutional structures

In a federal system, the constituent units need to have workable structures of government through which the powers vested in them can be exercised. These structures need to be established in their own subnational constitutions, in the federal constitution or, in some cases, by special statutes.

Forms and structures of democracy at the subnational level

The institutions of constituent units usually replicate, on a smaller scale, national/federal institutions. For example, provincial legislatures in South Africa are proportionally elected, like the national parliament, whereas state legislatures in the USA are elected by single-member plurality, like the federal Congress. Yet the existence of subnational governments also allows scope for institutional innovation: the US state of California and the German state of Bavaria, for instance, rely heavily on direct democracy (referendums and legislative initiatives), although direct democracy is absent at the national level in their respective countries. In rare cases, subnational institutions may function very differently from the national level: in Italy, for example, the national government is parliamentary, but regional institutions are basically presidential in form, with directly elected regional governors.

Particular constitutions for each constituent unit

In some federal systems, the constituent units have the authority to adopt their own constitutions within specified (usually broad) parameters:

- The Constitution of Australia both protects and recognizes the existing constitutions of the states, while allowing each state to modify its own constitution according to its own procedures: ‘The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State’ (section 106).
- In Argentina, the national constitution specifies certain general democratic conditions that the subnational constitutions must meet: ‘Each Province shall adopt for itself a constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, ensuring its administration of justice, municipal government, and elementary education. Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions’ (article 5).

The ability of each unit to adopt its own constitution means there can be considerable variation between them. For example, provisions with regard to electoral systems, terms of office, direct democracy, second legislative chambers and other details can differ between subnational units in response to particular needs and preferences.

National-level regulation of subnational institutions

In other cases, the institutions of subnational government may be prescribed by the federal constitution:

- The 1999 Constitution of Nigeria, for example, describes the institutions of the subnational governments in some detail, giving each unit an identical system of government.
- The Constitution of India prescribes the mechanisms of government at the subnational level, although it introduces some scope for local variation by allowing states to choose between a unicameral and a bicameral legislature.

This prescriptive approach is most attractive in situations where there are no pre-existing subnational institutions, and where these therefore have to be created

by the national constitution. It is also attractive in situations where democracy and the rule of law are less well established, and where, as a consequence, it is safer to prescribe its institutional forms than to rely on local initiative. In such cases, the national constitution has an important role as a guarantor of democracy at all levels.

Regulation of subnational institutions by special statutes

A third design option is for the institutions of constituent units to be regulated by special laws, such as statutes of autonomy that are negotiated between the central government and each state, province or region. This procedure allows constituent units to be involved in the design of their own institutions, but it also gives the federal government a voice in the process. It can be regarded as a middle course between allowing each constituent unit to adopt its own constitution, on the one hand, and prescribing one-size-fits-all institutions in the federal constitution, on the other. This arrangement is more common in quasi-federal countries that use regional decentralization (see section 9) than in truly federal systems.

- In Spain, ‘Statutes of Autonomy’, establishing the institutions of the autonomous communities have a status below the constitution but above ordinary law, and they can only be changed with the consent of both the national parliament and the autonomous community concerned. In the Spanish case, the constitution requires that statutes of autonomy conform to certain basic principles of democracy, including the election of an assembly by proportional representation and universal suffrage, the election of a regional president by a vote of the assembly and the establishment of an executive cabinet that is responsible to the assembly, as well as rules concerning the independence of the judiciary (article 152).
- In Italy, regional institutions are defined by special statutes that ‘in compliance with the Constitution, shall lay down the form of government and basic principles for the organization of the Region and the conduct of its business’ (article 123).

8. Fiscal federalism



Tax collection and revenue sharing

The economic effects, advantages and disadvantages of different taxation systems are beyond the scope of this Primer, but a key consideration for constitutional designers is the extent to which subnational units should have their own tax base and their own revenue-raising powers. Whatever the legal distribution of legislative powers, the distribution of access to funds can be a major determinant of the practical degree of centralization or decentralization. Therefore, robust funding arrangements that give state, provincial or regional authorities sufficient resources and sufficient autonomy in the allocation of those resources are necessary if effective decentralization of power is to be a reality.

Full fiscal autonomy

Full fiscal autonomy is an arrangement whereby subnational legislatures raise all of their own financial resources through their own taxes, charges, fees and loans, and they each pay for their own administrative costs and public services out of their own budgets. The federal government does not have its own tax-collecting powers, but requires subnational governments to make payments to defray the costs of shared services. These payments may be assessed on the basis of population or by some other formula, as specified in the constitution or as agreed from time to time between the federal government and the subnational units.

This provides the subnational units with a maximum degree of fiscal freedom and responsibility to their own citizens, as well as fiscal levers through which to influence economic development, but it may have several adverse consequences, including:

- economic efficiencies arising from different forms and rates of taxation;
- tax shopping (taxpayers relocating to the least burdensome area) and a resulting race to the bottom (whereby subnational authorities race to cut taxes in order to attract businesses, thereby eroding their revenue-raising ability, with severe implications for public finances and the delivery of public services);
- increased economic disparities between subnational units; and
- a weak federal government, which becomes overly dependent on the goodwill of subnational units in order to meet its financial needs. For these reasons, full fiscal autonomy is rare in federations and more common in loose confederations or situations of special autonomy.

Division of revenue-raising powers

A common arrangement in federations is for some taxes to be levied by subnational units and others to be levied by the federal government, and for this assignment of tax-collecting powers to be constitutionally prescribed. As a general rule, to avoid the risks of tax shopping and a race to the bottom, taxes on things that are portable (such as income and capital-gains taxes) are usually better handled by the federal government, while those on things that are less mobile (such as sales and property taxes) are handled at the state or provincial level.

Borrowing powers

Borrowing is another potential source of revenue for subnational governments. Federal systems vary in the extent to which they permit subnational governments to incur debts and the extent to which they guarantee such debts. A federal guarantee of debts can protect subnational governments from bankruptcy but may also encourage a lax approach to borrowing and spending unless such guarantees are accompanied by federal supervision of subnational budgets.

Mandated sharing of revenues

This is an arrangement whereby one level of government sets and levies taxes, but where the revenues raised from those taxes are then distributed, according to some prescribed or agreed formula, between two or more levels of government: a constitution, for example, may prescribe that all income taxes are to be determined federally (for the reasons set out above), but that part of the revenues

raised from such taxes are to be reserved for use by subnational authorities. Revenues may be divided on the basis of the location of derivation (i.e. each subnational unit is entitled to a share of the revenues raised in that unit, meaning that each unit has incentives to maximize its own tax base, even though this may increase regional discrepancies) or on the basis of population or assessed fiscal needs (which can have an equalizing effect between units).

Federal grants and loans

If subnational units do not generate sufficient revenue internally to support their functions, they will be dependent on external sources of finance, most notably from the federal government. Such dependence may limit their autonomy, since federal grants or loans often come with binding conditions. In the USA, for example, conditional grants (whereby the states receive money to support a particular programme or policy only if they act in accordance with the legislative framework laid down by the federal Congress) have been used by the federal government to extend the range of federal control into areas such as education, roads and health care, areas that are, by a strict reading, constitutionally reserved for the states. In some cases, the right of the national legislature to provide for spending through federal grants or loans is explicitly recognized in the constitution (e.g. Nigeria); in others (e.g. Belgium), such spending is limited by court decisions (Anderson 2008: 38).

Institutionalizing flexibility: finance commissions

Disagreements over the allocation of revenues or the distribution of taxation powers may be a sticking point of constitutional negotiations. Part of the difficulty is that these are, or appear to be, zero-sum negotiations: every penny or cent granted to subnational authorities is directly lost to the federal authorities. The long-term outcome of agreements reached during the constitution-building process can also be unpredictable. For example, agreements might be reached on the assumption that oil is abundant, and these agreements might be tenable as long as oil revenues are steady, but if the price of oil drops, or the supply of oil dries up, this could cause a fiscal crisis from which the constitution offers no easy escape route.

One solution is to introduce a degree of flexibility into the fiscal arrangements of the constitution, such that these negotiations, rather than being tied to the constitution itself, can be revisited from time to time. In India, for example, there is a Finance Commission (article 280), which is appointed at five-year intervals to advise on the distribution of certain tax revenues between the Union Government and the states. A similar National Finance Commission, consisting of national and provincial finance ministers, exists in Pakistan (article 160).

9. Federalism and the constitution as a whole



The decision to adopt a federal system will shape the rest of the constitutional structure, with implications for the structure of the legislature, the constitutional amendment process and other aspects of constitutional design.

In situations where federalism is adopted primarily as a response to the diversity of a heterogeneous society, federalism's commitment to territorial decentralization cannot be considered in isolation but only in relation to the whole package of constitutional provisions that form the bargain between communities, including such matters as language, religion and minority representation.

Constitutional supremacy and constitutional amendment rules

Constitutional supremacy (the juridical superiority of a constitution over ordinary laws) and **constitutional entrenchment** (the fact that it is more difficult to amend a constitution compared to ordinary laws) are necessarily associated with federalism.

The supremacy and entrenchment of the constitution provide guarantees to the subnational units that their existence, status and powers will be recognized and their autonomy respected. If these guarantees are breached, the subnational units will usually have recourse to a supreme or constitutional court. Without such protection there can be no truly federal sharing of sovereignty and no clear guarantee of autonomy against majorities at the centre.

In a federal country, the process for amending the constitution might have to be designed so that it prevents any change to the distribution of powers without the consent of the subnational units:

- Australian states have a constituent role: reflecting the federal nature of the polity, sovereignty is shared, through the amendment procedure, between the people of Australia as a whole and the people of each state as a unit. Thus, an amendment to the Constitution of Australia must be approved not only by a nationwide popular majority but also by a majority in at least four out of the six states.
- In some countries, the role of the subnational units may be invoked only when the proposed amendment concerns the powers or jurisdiction of those units or other essential parts of the constitution integral to the federal arrangement. In India, for example, the constitution can be amended by a two-thirds majority of votes cast in both houses of the central parliament, but amendments concerning the distribution of powers between the central government and the states, the representation of the states in the central parliament, and the judiciary, as well as certain other provisions, must also be approved by a majority of the state legislatures.
- In some cases, a unanimity rule may apply. The Constitution of Canada provides a general amending formula by which amendments must be approved by the legislatures of two-thirds of the provinces, having between them at least 50 per cent of the population. This rule was designed to ensure that each of the two most populous provinces (Ontario and Quebec) would, in most cases, have a veto over amendments. Certain specified amendments, however (including those relating to the status of English and French as official languages and the composition of the Supreme Court), require unanimous approval by all provinces. Amendments that specifically limit the powers and rights of provinces apply only to those provinces adopting the amendment, giving each province an opportunity to opt out to protect its rights.
- The principle of federalism may be an unamendable provision, protected by a so-called eternity clause (e.g. Germany). Courts may also decide that federalism is such an essential and defining feature of the basic structure of the political system that it is, in principle, beyond the reach of the amending power (e.g. India).

For more information, see International IDEA Constitution-Building Primer No. 10, *Constitutional Amendment Procedures*.



Participation of subnational units in national legislation and policymaking

As well as guaranteeing the autonomy of constituent units (**self-government**), federalism also includes the establishment of institutions designed to promote the recognition and inclusion of these units at the national or federal level (**shared government**).

This typically takes place through the upper house of a bicameral legislature, the members of which may be directly elected by the people of the states, provinces or regions (Argentina, Australia, Kenya), indirectly appointed or elected by subnational legislatures (Austria, Germany, Pakistan) or selected by some combination of these means (Spain). A range of possibilities exist in terms of how a second chamber can be constituted, and its role and powers. For more information, see the International IDEA Constitution-Building Primer No. 2, *Bicameralism*.

While second chambers can be a useful means of subnational representation, they are rarely effective institutions of intergovernmental co-ordination (an exception to this rule may apply in cases where subnational governments are directly present in the second chamber, as in the German *Bundesrat*). Therefore, to meet the need for better consultation and co-ordination between different levels of government, other mechanisms have been developed:

- In Canada, for example, there is a First Ministers' Conference, which brings together the prime minister of Canada and the premiers of the provinces. The First Ministers' Conference has no basis in the written constitution; it exists only as a matter of conventional practice.
- In Pakistan, in contrast, consultation and co-ordination mechanisms are formalized in the Constitution. There is a Council of Common Interests (article 153) that brings together the (federal) prime minister and the chief ministers of the four provinces, which has a mandate to 'formulate and regulate policies' in relation to a specified range of policy areas (article 154). The 18th Amendment attempted to strengthen the Council of Common Interests by: (a) requiring the prime minister to constitute it within 30 days of taking office; (b) extending the range of policy areas over which it has jurisdiction; (c) requiring the Council to meet at least once every 90 days; (d) allowing the chief ministers of provinces to request meetings; and (e) requiring the Council to submit an annual report of its activities to parliament.

- South Africa places a constitutional obligation (articles 40 and 41) on the national government, the provinces and local authorities to work cooperatively in their ‘distinctive, interdependent and interrelated’ spheres of authority, and requires all authorities, at all levels, to conform to certain norms of cooperation, constitutionalism and good government.

Think Point 2

If federalism is primarily intended to provide recognition and autonomy for particular ethnic, linguistic, cultural or religious groups, it is important for those engaged in constitutional negotiations to consider how these objectives can be balanced and supported by provisions for inclusion at the centre. What scope is there for trade-offs between autonomy and inclusion? What is more important: decentralization of power to communities or the inclusion of those communities in the central government?

Executive and judicial institutions

Executive institutions

Where federalism is a response to cleavages of culture or identity in society, other forms of inclusion for the distinct subdivisions of society may be incorporated into central institutions, and this can extend to both executive institutions and legislatures:

- In Belgium, the cabinet must consist of an equal number of French-speaking and Dutch-speaking members.
- In Switzerland, the presidency rotates around the seven-member executive council, which, by convention (although not by any constitutional law), always has a balance of members from French-speaking, German-speaking and Italian-speaking cantons.
- In Nigeria, a presidential candidate must win not only a plurality of votes cast but also at least 25 per cent of the votes in two-thirds of the 36 states (article 133). This rule is designed to promote the inclusion of different ethnic and religious communities in national politics by making it difficult for a divisive candidate to be elected.



Judicial institutions

The judiciary in a federation is often called upon to resolve disputes between the different levels of government and to make pronouncements on the powers and responsibilities of each level. This places a special responsibility on the supreme or constitutional court at the apex of the judicial system, which must have an unassailable reputation for independence, neutrality and competence. In countries where federalism is a response to cultural diversity, there might be a need to ensure the representation of different communities on the court or their balanced participation in the judicial appointments process. In Canada, for example, one-third of the members of the Supreme Court must be appointed from Quebec. For more information on the composition of supreme or constitutional courts, see International IDEA Constitution-Building Primer No. 4, *Judicial Appointments*.

Scrutiny, oversight and fourth-branch institutions

To ensure effective democracy and clean, responsive governance, and to prevent power from falling into the hands of local oligarchs and power brokers, an effective federal system may, somewhat paradoxically, require the existence of strong central institutions, such as the national civil service, the judiciary and an electoral management body (electoral commission). Keeping these institutions on the national or federal level can help uphold the rule of law, protect equality between individuals, ensure that territorially concentrated majorities do not abuse their power. Having these institutions operate on the federal level, rather than creating separate institutions for each state, province or region, can also reduce duplication and save money.

Emergency intervention by the federal government

Most federal systems allow the federal government to intervene in the internal administration of the constituent states or provinces in order to ensure democratic stability or to uphold human rights, the rule of law and basic standards of good governance. The Constitution of India, for example, declares that, 'It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution' (article 355); if a state fails to fulfil this duty, the president may make a proclamation to the effect that legislative and executive powers in the state are transferred on a temporary basis to the national parliament and to the national government, respectively (article 356).

There are two reasons for provisions of this type: (a) the failure of any part of a federation to maintain an acceptable democratic standard has consequences for the well-being of the whole federation (it would be untenable, for example, for a

state governed by a dictator to participate fully as a member of an otherwise democratic federation); and (b) the citizens of each constituent unit have certain fundamental substantive and due-process rights that it is the duty of the federal government to uphold, and the federal government could not uphold these rights without having the power to intervene.

However, a federal power to intervene in the internal politics and administration of constituent units could be abused in order to undermine the federal distribution of power. The governments of constituent units would have real little autonomy if they were in peril of being dissolved or being stripped of their powers, at any time, for any reason, by an arbitrary act of the federal government.

One way of preventing abuse of the power to intervene is to limit it in time and to require explicit legislative approval. In India, a proclamation of 'President's Rule' in a state must be approved by the parliament within two months, and thereafter at six-month intervals. In Brazil, the federal president has the authority to 'decree and enforce' a federal intervention in a state (article 84), but the Congress has the authority to 'approve' a federal intervention and to suspend it (article 49). Additional safeguards in Brazil include the right of an advisory body (the Council of the Republic) to give its opinion on federal interventions (article 90), the right of the president of the Senate to convene the Congress if a state of federal intervention is in effect (article 57) and a prohibition of constitutional amendments during an intervention (article 60).

10. Possible alternatives to federalism



Other forms of macro-decentralization (quasi-federalism)

Federalism has many disadvantages. Even when some form of territorial power-sharing is needed, federalism is not the only way (and not necessarily the best way in all contexts) of achieving it. There are four major alternatives: confederation, devolution, regionalism and special autonomy (federacy).

Confederation

In some cases, confederation may be an alternative to federalism. Confederalism usually implies a looser form of union than is common in modern federalism. Representation tends to be organized on an intergovernmental rather than elective basis, with each state government or state legislature sending delegates to the confederal assembly. States might have weighted votes, in proportion to their tax base or population, but typically members of a confederal assembly vote en bloc as state delegations. The powers of the confederal institutions are typically limited to a very small range of policy areas such as foreign affairs, defence, trade and possibly citizenship. The decisions of confederal institutions are typically binding only on the states, which have to translate them into state law, rather than being directly binding on the people.

This sort of confederal system is sometimes demanded by groups in federal systems that are seeking greater autonomy than is permitted under the federal constitution without the destabilizing effects of full independence. Confederal solutions have historically been proposed, for example, in Belgium, Spain and Canada.

Devolution

Devolution is a mechanism for **decentralizing power without sharing sovereignty** (see Box 10.1. for an example). The essence of devolution is that the central level (e.g. a national parliament) establishes decentralized institutions (e.g. a provincial parliament or assembly) and determines the nature and the scope of the powers that are delegated to those institutions. In principle, if not always easily in practice, the powers of devolved institutions can be **revoked or overturned**, or their institutional arrangements changed, by a unilateral decision of the central legislature. Devolution is a flexible arrangement that can overcome some of the difficulties associated with federalism. It does not necessarily require a rigid constitution or strong judicial review, since most disputes between the centre and the devolved regions can ultimately be resolved by political negotiations, not by judicial decisions.

However, this flexibility means that devolution depends on a high degree of trust and goodwill. If subnational units cannot trust the national legislature to protect their interests and autonomy by political means, then devolution may provide insufficient guarantees to the devolved regions.

Box 10.1. Devolution in the United Kingdom: the case of Scotland

The United Kingdom consists of four nations: two kingdoms (England and Scotland), a principality (Wales) and a province (Northern Ireland). Each has its own culture, political parties and institutions. Previously, it was a unitary state with all parts of the United Kingdom being governed directly by the British Parliament in Westminster.

Since 1997, a process of devolution of power to Scotland, Wales and Northern Ireland has been taking place, based on specific arrangements for each country, such that each has a different degree of autonomy. Because the UK has no written constitution, the autonomy of devolved bodies depends on decisions of the British Parliament, and the balance of powers can in principle be changed by a unilateral decision of the Parliament.

Regionalism

Regionalism blurs the distinction between federalism and devolution. For example, a regionalist constitution may recognize the existence and perhaps certain core functions of subnational units (as with federalism) while allowing the central legislature to limit or extend the powers of these units (as with devolution). Or it may provide for the representation of the subnational units in

the central legislature but permit the amendment of the constitution without the consent of subnational units. Italy, for example, developed an innovative regional structure following the restoration of democracy after the Second World War. In those parts of Italy that had a notable linguistic minority, or that were geographically removed from the centre by virtue of being an island, this created, with immediate effect, five special regions (Aosta Valley, Friuli-Venezia Giulia, Sardinia, Sicily and Trentino-Alto Adige), each with its own constitutionally guaranteed autonomy. The rest of Italy was subsequently divided into a further 15 ordinary regions, with fewer powers, in a second wave of regionalization in the 1970s. This was mainly in response to demands for better governance. Thus, in Italy two approaches to decentralization applied: in the special regions, extensive decentralization was a means of accommodating cultural differences, while in the ordinary regions decentralization was a means of improving governance. However, the improvements in governance have been variable, with some regions performing better than others (Putnam 1994). The constitutional amendment process allows any five regional councils to demand a referendum on an amendment unless the amendment is passed by a two-thirds majority in both houses of parliament.

Special autonomy (also known as federacy or home rule)

These terms describe a form of asymmetrical autonomy that is usually applied only to a small jurisdiction that enjoys a privileged semi-detached status in relation to the larger country of which it is a part or to which it belongs. The degree of autonomy enjoyed by the jurisdiction, in terms of the range of powers it possesses and the control it has over its own finances, is usually extensive, but its degree of integration into the central state is low (for example, it might have autonomy over almost everything except foreign affairs and defence, but have no representation, or minimal representation, in the legislature of the central state). Examples of jurisdictions enjoying special autonomy of this type include the Cook Islands (New Zealand), the Faroe Islands and Greenland (Denmark) and Åland (Finland). Overseas Territories like Bermuda, the Cayman Islands and Gibraltar, and Crown Dependencies like Jersey, Guernsey and the Isle of Man, also possess a similar degree of special autonomy in relation to the UK; the UK allows these jurisdictions almost complete self-rule while retaining responsibility for foreign affairs and defence.

Form and substance

These forms of decentralization are shown in Table 10.1. In practice, these distinctions are not always clear. Scholars may disagree about the terminology in general and the classification of any particular constitution.

Table 10.1. Federalism and alternative forms of macro-decentralization

	Confederation	Federation	Regionalism	Devolution
Locus of legal sovereignty	Ultimately remains in the several states	Divided between the several states and the federation	In the country as a whole, although some special regions may have a more bilateral or conditional status	In the country as a whole (in central-level institutions)
Permanence of distribution of powers	Powers of confederal institutions may be limited or revoked by the decision of the several states	Permanent, subject to the rules concerning federal constitutional amendments	Permanent, but the distribution of powers may be negotiable without constitutional amendment	Powers of devolved areas can be revoked, or unilaterally changed, by the centre
Extent of decentralization	Almost all aspects of domestic policy are determined by the several states; confederation mainly limited to defence, foreign affairs and trade	Variable: there is no necessary connection between the formal constitutional type and the actual degree of decentralization (either in terms of the range of legislative powers that are decentralized or the fiscal arrangements supporting subnational governments)		
Constitutional basis of powers	Narrowly specified by treaty or articles of confederation This has, at least in part, the character of an instrument of international law, not a national constitution	Specified in the federal constitution The constitution will usually be rigid, will be upheld by judicial enforcement and will typically give the states a voice in the constitutional amendment process	General outlines may be specified in the national constitution, but details of powers in each region may depend on specifically negotiated regional agreements (e.g. statutes of autonomy)	Determined by the central legislature and can, in principle, be altered at will by the central legislature Little or no constitutional basis or protection for devolved institutions
Typical fiscal arrangements	States raise all of their own revenues and make payments to confederation to pay for common services	Federal and state legislatures each have their own basis for raising revenue; may be some redistribution by the federal government between the states	National and regional legislatures each have their own basis for raising revenue; perhaps some redistribution Some regions may have special fiscal powers	Varies: may be similar to regionalism, or the devolved legislatures may depend on bloc grants from the central authorities

	Confederation	Federation	Regionalism	Devolution
Representation	Confederal authority is a congress of delegates of the states, often with an intergovernmental character	Typically (but not always) two houses of a federal legislature, one elected by the people as a whole, and one representing the federal units	Varies: regions may have some special representation in the national legislature	Varies, but typically devolved institutions, being a creation of ordinary statutes, have no special representation in central institutions
Examples	Luxembourg in the Benelux Union, Hungary in the Austro-Hungarian Empire	Australian states, US states, Indian states, Canadian provinces, Argentine states	Regions of Italy, autonomous communities of Spain	Scotland, Wales and Northern Ireland in the UK

Countries that are difficult to classify, such as Spain or South Africa, may be considered by some as regionalist but by others as federal (or perhaps as quasi-federal or as federal in all but name). Besides, these formal differences are not always reflected in the degree of substantive decentralization. It is not necessarily the case, for instance, that a formal federation is more decentralized, in substance, than a regionalized or devolved state. Spain, for example, does not formally define itself as a federation, but some of its autonomous communities (especially those with special historical rights, such as the Basque Country) have extensive and well-entrenched autonomy, while some formal federations, such as Austria and Malaysia, are highly centralized.

Moreover, these labels may not be very helpful during the negotiations and deliberations leading to the adoption or reform of a constitution. In a constitution-building process, some participants may become symbolically attached to labels like ‘federalism’ or ‘regionalism’. It would be wise, instead, to first consider the practical needs of the country and of its particular subnational units, and then to think about how these needs can best be met through a constitutional design that is both workable and broadly acceptable without getting too fixated on whether the resulting constitutional framework should be classified as federal, regional or devolved.

Stronger micro-decentralization (local government)

In some circumstances, stronger **micro-decentralization** (e.g. devolution of power to municipal-, county- or district-level authorities) might be an attractive substitute for federalism or other forms of macro-decentralization. This approach can be suitable in situations where (a) decentralization is desired to improve governance, accountability and public participation, and to promote development policies and services that are tailored to local needs, but where it does not need to

accommodate territorially concentrated ethno-religious, linguistic or cultural diversity; or (b) such communal groups are very locally concentrated, in particular towns, villages or enclaves, rather than being present in large enough areas to form viable territorial regions, provinces or states. In these cases, micro-decentralization may also help protect minorities within minorities; it can be used not only as an alternative to federalism but also as a complement to it.

However, this approach has also been used cynically to refuse demands for macro-decentralization based on national or cultural identity. In such situations, it is unlikely to be an adequate solution (see Box 10.2).

Non-territorial (cultural) autonomy, proportional representation and veto powers

In some contexts, such as when there is a need for the autonomy and recognition of particular communities in a relatively small state, or where these communities are not territorially defined, a system of non-territorial autonomy may be appropriate. This allows for distinct communities to express their identity and to manage their interests without having to have separate territorial jurisdiction.

Box 10.2. Alternatives to macro-decentralization: Scotland in the UK, 1979–97

During the 1980s and 1990s, many in Scotland sought to establish a Scottish Parliament that would have broad legislative powers over domestic affairs. This was, however, strongly opposed by the British Government. Instead, the UK made use of a variety of alternatives to macro-decentralization. These ranged from the symbolic (e.g. the return of ‘the Stone of Destiny’, a historical object of cultural significance, to Scotland) to the institutional (e.g. allowing Scotland to be over-represented in parliament, in proportion to its share of the British population, or strengthening the legislative role of the Scottish Grand Committee).

One of the measures attempted was to reform local government in Scotland, creating a new structure of 32 single-tier local authorities. It was hoped that such local devolution would outflank demands for national devolution (to a Scottish parliament). These measures proved unsuccessful, however, and by the time the question was put to the people in a second referendum, in 1997, there was a broad public consensus in favour of creating a Scottish parliament.

Non-territorial autonomy

Examples of non-territorial autonomy can be found in the various systems of personal-status law found in some multicultural or multi-religious societies. In

India, for example, Muslims, Hindus and Christians have their own law codes governing matters such as marriage and divorce: a Muslim man in India may lawfully enter into a polygamous marriage; a Hindu man may not. In this sense, law is personal rather than territorial, and, for these purposes, two neighbours may be subject to the jurisdiction of different laws. Such decentralization of the law may be accompanied by the decentralization of the judiciary. In Kenya, for example, there are special courts for Muslim citizens, with jurisdiction over personal status, marriage, divorce and inheritance, and in which judges (*kadhis*) must be practising Muslims trained in Islamic law (Constitution of Kenya 2010, article 170).

Forms of non-territorial autonomy may be also applied on linguistic grounds, particularly in the field of education. The Canadian province of Ontario, for example, makes provision for separate English- and French-language school boards, and for secular and Catholic school boards for each language. By this means, the French-speaking and English-speaking communities, as well as both Catholic and non-Catholic citizens, are able to exercise some cultural autonomy over education.

Proportional representation

One way of encouraging such accommodation at the centre is to adopt a system of proportional representation for legislative elections. Electoral systems that award seats on the basis of a plurality or a majority of the votes cast in single-member districts are likely to exaggerate any differences in voting patterns between regions. If a majority of the people in a particular region tend to vote against the party in power at the centre, this is likely to have two undesirable consequences: first, the party in power at the centre will have little incentive to pay attention to the needs and interests of the region in question—if it cannot win a plurality of the votes, it matters little whether it alienates all voters or only the majority of them; second, the parliamentary delegation of the party in power at the centre is likely to have few or no members representing the region in question and is therefore likely to become increasingly out of touch. This is a recipe for alienation. Proportional representation can address these two problems. The governing party at the centre might only win a minority of votes in the region, but those votes will count in terms of winning seats, giving the party (a) an incentive to pay attention to that region; and (b) a block of members of parliament elected from that region who understand the region's needs.

Minority veto powers

Another possibility is to grant cultural, religious, ethnic or linguistic minorities veto powers at the centre. In Kosovo, 20 of the 120 parliamentary seats are reserved for national minorities. The members representing these minorities have the right to veto laws concerning their 'vital interests', including: municipal

government, community rights, language laws, cultural heritage, freedom of religion, education and public holidays (Constitution of Kosovo 2008, article 81). The representatives of these minorities also have reserved ministerial portfolios and reserved seats on the Judicial Council and the Central Election Commission. In Cyprus, the Constitution of 1960 provided for the election of a Greek-Christian president and a Turkish-Muslim vice president, elected by their respective communities, who would each possess veto power over certain governmental decisions and legislation. Neither of these solutions has worked entirely as intended, but if there is enough goodwill and trust to make such mechanisms workable, they might enable communal autonomy and recognition to be realized even in a small state where territorial federalism would be impractical.

Secession

In some cases, secession may be an attractive solution. Rather than being awkward cohabitantes of a tense and unwieldy federation, it may be better for two countries to separate and to relate to one another as neighbours. This simplifies governance arrangements, removing a whole layer of complex federal institutions. Secession can also help create a smaller, more convenient public space in which democratic participation can take place; the existence in each state of a more unified demos, with greater homogeneity of culture, values and interests, may provide conditions in which the solidarity and social cohesion necessary for effective democracy can flourish.

A small number of constitutions contain explicit provisions giving the constituent parts, or certain specified parts, a right to secession. In providing a right to secession, the constitution can also limit that right or provide procedural channels for its proper exercise. The 1994 Constitution of Ethiopia, for example, recognizes the 'unconditional right to self-determination, including the right to secession' of its constituent units, but this right can be exercised only at the initiative of a two-thirds majority of the members of the legislature of that unit. Similarly, Nevis, part of the Caribbean nation of St Kitts and Nevis, has a constitutional right to declare itself independent by a two-thirds majority of the votes cast in a secession referendum. While such a high procedural barrier may be an effective guarantee of unity for members of substantial minorities in a secessionist territory, it may also, depending on the demographics and the political situation, render a constitutionally protected right to secession difficult to claim in practice.

The disadvantages of secession may be mitigated when the seceding entities can meet their needs for security and trade by belonging to a wider international bloc, such as the European Union, the North Atlantic Treaty Organization (NATO) or other intergovernmental organization. The short-lived Czechoslovak Federation,



for example, gave way relatively quickly and painlessly to the independent Czech and Slovak republics, both of which are now members of the EU and NATO.

However, secession is usually only available if the seceding territory is economically viable and has sufficient state capacity to make independence work; it might not be a suitable alternative for very small or very poor territories, or those without a history of stable governance. Moreover, this option is only attractive if the process of secession can take place peacefully in a mutually agreed manner; the secession of a territory without the agreement of the central government may lead to violent conflict and perhaps to a humanitarian crisis that may then require external intervention. The secession negotiations may need to consider the rights of minorities in the seceding territory, the distribution of assets and liabilities, the relocation of inhabitants, the establishment of new state institutions (such as an army and a diplomatic service) for the territory and transitional rules for matters such as currency or public pensions. These arrangements may incur significant costs.

11. Decision-making questions

1. Why is federalism being considered, and what is the problem to which federalism is the proposed solution? Is it motivated by the need to accommodate deep ethnic, religious, cultural and/or linguistic cleavages? Or is it a response to demands for greater public involvement in decision-making and an attempt to make service delivery more responsive to the people concerned?
2. What are the consequences of the answers to Question 1? What effect will these answers have on the range of possible options for federalism (e.g. federalism as a response to cultural diversity might concentrate on the decentralization of cultural, linguistic, educational and religious authorities, whereas if federalism is a response to demands for development and public services, there might be greater emphasis on the decentralization of economic powers)?
3. Are there existing state or provincial institutions to which further powers can be decentralized? Or would those institutions have to be created from scratch? How can these institutions be made properly representative of, and responsive to, the people?
4. What are the alternatives to federalism? Have regionalism and devolution been considered? What about other alternatives, such as stronger local democracy or non-territorial cultural autonomy? How effectively would these alternatives meet the needs and desires of the people?
5. What is the country's financial capacity? The institutions of federalism can be expensive: has a preliminary costing been undertaken? Are these costs sustainable? Have they been compared to the costs of alternatives?



6. What is the human capacity of the country? Is there a sufficient number of educated, capable people to staff an extensive system of federalism? Does this capacity exist in all parts of the country? If not, what steps can be taken to develop that capacity?
7. Are demands for federalism uniform throughout the country or only expressed in certain parts? If the latter is the case, could asymmetric arrangements providing for the special autonomy of those areas be a better solution than a one-size-fits-all model of federalism?
8. What fail-safes or guarantees are needed to ensure that decentralized powers are not used in corrupt, partisan or ineffective ways? Should there be a reserve power for the central/national/ federal authorities to intervene in a region/state/province in cases of emergency or failures of governance? If so, how can such mechanisms be protected against abuse by the centre?
9. Are there natural or historical boundaries that are clear and well established between the subnational units? Are the areas of subnational units practical from the point of view of efficiency and good government? Should there be a mechanism for revising boundaries without needing to amend the constitution?
10. How should autonomy for subnational units be balanced with the involvement of those units in national decision-making? What mechanisms of representation (e.g. inclusion in a second chamber) and coordination (e.g. inter-executive cooperation) need to be put in place?
11. How can the fiscal arrangements of power-sharing be made flexible to respond to changing needs and resources, while at the same time protecting subnational units from undue financial dependence on the central/national/federal government?
12. Does the amendment formula for the constitution reflect the role of subnational units in the political system? What is the appropriate balance between the sovereignty of those units and the sovereignty of the whole? Are special vetoes necessary to uphold the constitutional bargain?
13. What is the political-party situation? How will the political parties shape the working of the proposed institutions of macro-decentralization? Would these institutions still be workable if the political-party situation were to change radically in the future (e.g. if a dominant-party system were to become more competitive, or if a two-party system were to fragment into multiple parties)?

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Annex



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