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Constitutional Design: Options for Decentralizing Power

Cheryl Saunders

Laureate Professor Emeritus
Melbourne Law School

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About the Author: Cheryl Saunders is a Laureate Professor Emeritus at Melbourne Law School and co-convenor of the Constitution Transformation Network. She works in the fields of comparative constitutional law and comparative public law more generally. She is a President Emeritus of the International Association of Constitutional Law and a former President of the International Association for Centres of Federal Studies. She is a senior technical advisor to the Constitution Building Program of International IDEA and a former Board Member of International IDEA.

Cheryl's work in the field is characterised by two assumptions. The first is that comparative constitutional law should be as global as possible in its reach, in both theory and practice. The second is the importance of context in comparative constitutional law, including recognition and appreciation of difference, despite the realities of globalisation. Both inform her involvement in the activities of the Constitution Transformation Network. Cheryl participates in networks of constitutional scholars and practitioners throughout the world. She has written widely on aspects of comparative constitutional law, with a particular focus on constitution transformation in Asia and the Pacific. She has had practical involvement in constitution making and change in Asia, the Pacific, Africa and the middle east as an advisor with comparative expertise and an appreciation of how that can effectively be shared.

Editor: Charmaine Rodrigues, Coordinator, Constitution Transformation Network

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I. Introduction

The functions of government that a state performs can be decentralized in various ways and to varying degrees. This Paper is divided into 3 parts, which together are intended to guide the reader in understanding the key building blocks involved in building a decentralized state and identifying the key design issues involved. The paper identifies 3 common models of decentralisation, using country case studies to explain the key design features of each model.

Part 1 of this Decentralization Policy Paper Series identified five principal building blocks for constructing a decentralized system of government. In summary they were:

- **Configuration**, namely, the number of spheres or levels of government and the number of units at each level;
- **Depth of decentralization**, measured in terms of the extent of authority and the autonomy of the other orders of government;
- **Division of powers**, including the subject areas devolved and the legal framework for it;
- **Devices for shared rule** which are designed to encourage shared ownership of the whole state, by emphasising common interests and values and giving the constituent units a voice in central decision-making;
- **Systems of government**, including the relationship between the legislative and executive branches, any use of power-sharing, the electoral system and rights protection.



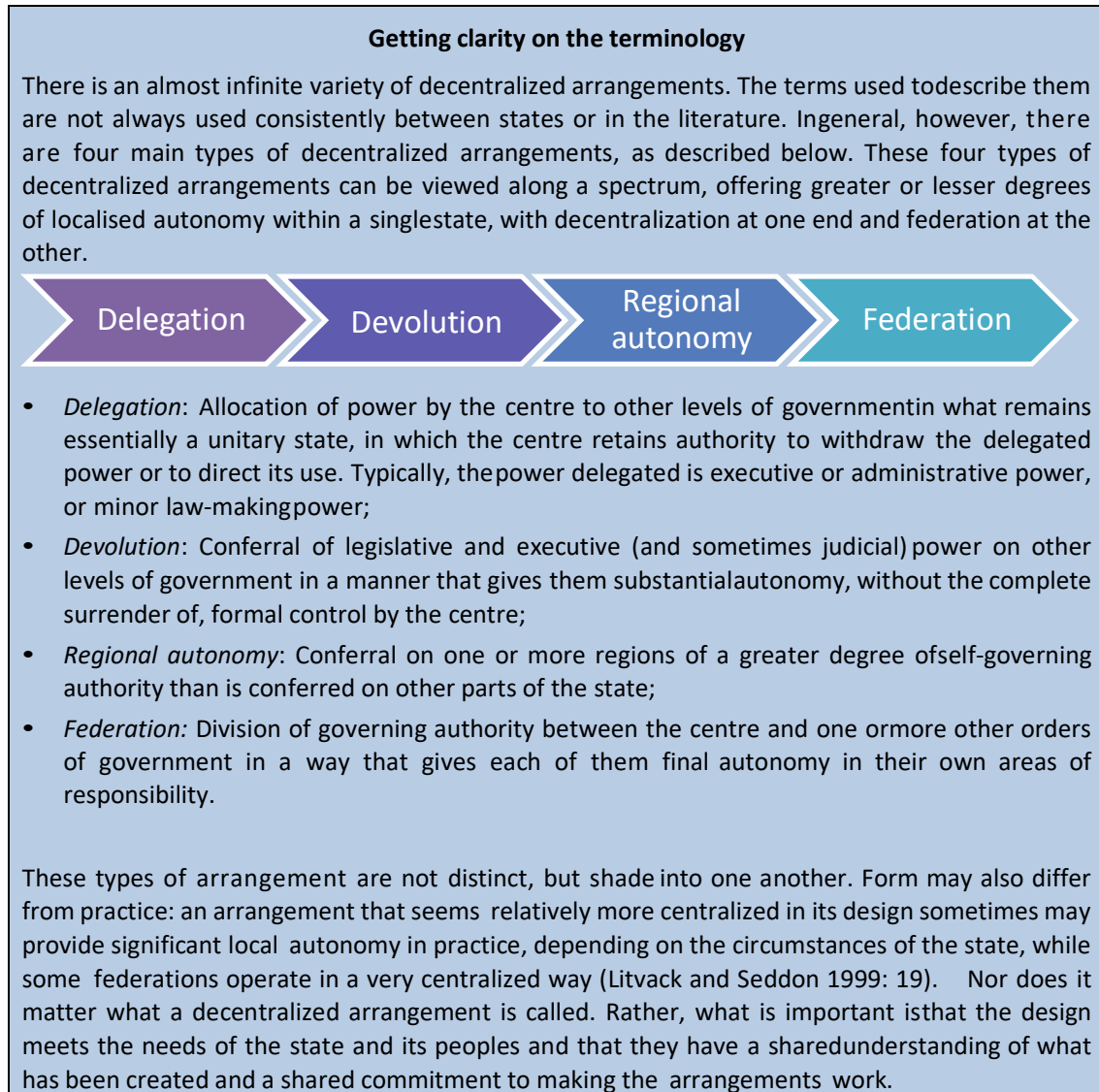
Part 2 of this Decentralization Policy Paper Series discusses key design and implementation issues to be considered when a country is moving towards a decentralized system of government. This section is intended only to illustrate the range of issues that should be considered, rather than setting out a blue-print for automatic adoption. The potential benefits of decentralization and the pitfalls to be avoided depend on the circumstances of each state. Arrangements for decentralization necessarily differ between states, in order to respond to the needs of each state, its peoples and its context.

Part 3 of this paper then canvasses the three principal models for decentralization and describe how each is designed to achieve particular results. It is essential to bear in mind that these are intended to help the reader to think about possible combinations, rather than to serve as definitive models. The selection of options by any particular state will depend on the aims and characteristics of that state and its people, as well as the context and particular circumstances. Each model is illustrated by a country case study. The Paper concludes by discussing critical implementation issues that need to be considered when moving forward with decentralization.

This paper recognizes that decentralisation arrangements are numerous and varied. For the purposes of this paper, decentralized arrangements may involve:

- The distribution of legislative, executive and judicial power, or a combination of one or more of them, between several levels of government;
- The division of responsibility for particular government functions and services between several levels of government. Examples include education, policing, water, immigration, health, the environment;

- The allocation of authority over fiscal matters (charges, taxes, borrowing) between several levels of government;
- Giving sub-national levels of government responsibility for their own institutional arrangements, for which they are accountable to their own people, with little or no intervention by the centre;
- The creation of central institutions that involve the sub-national levels of government in decision-making.



Key Strengths

A degree of decentralization of government is almost inevitable in the complex world of the 21st century. There is, however, choice about the degree of decentralization that a state adopts and the extent to which it is protected from quick and easy change.

The advantages of choosing a significant measure of decentralization depend in part on the circumstances of the state. Potentially, they include:

- Opportunities for more extensive participation in government and public life;

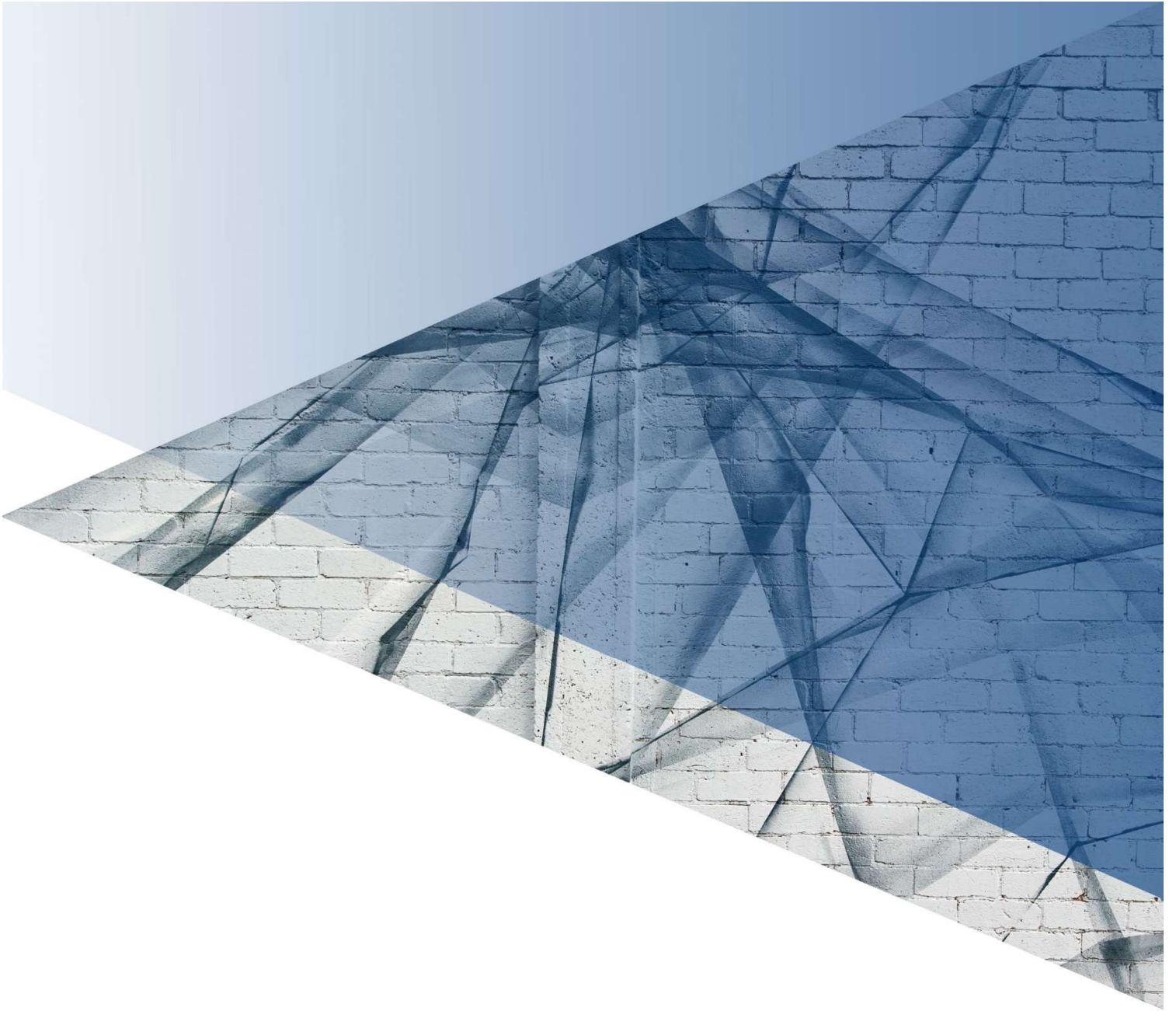
- More effective and responsive government;
- An approach to government that encourages innovation in parts of the country that, if successful, can be adopted elsewhere;
- Productive competition between governments as a by-product of the greater range of choice available to people;
- Additional mechanisms for the prevention, management and resolution of conflict.

The extent to which these advantages are secured in each case depends on the design of the decentralized arrangements, and of other complementary features of the system of government.

Key Weaknesses

The potential weaknesses of decentralization depend both on the degree of decentralization and of the effectiveness of its establishment. Unless adequately anticipated, weaknesses may include:

- A reduction in the effectiveness of government, unless attention is paid to the capacity of all orders of government to meet the responsibilities conferred on them;
- A fragmentation in policy making, unless effective procedures are put in place to enable collaboration and co-ordination;
- The capture of sub-national governments by small local interests;
- The entrenchment of divisions between the peoples of the state, unless the establishment of regions is complemented by mechanisms to build unity. The exacerbation of conflict, as a result of the treatment of regional minorities that are members of the national majority or of majorities in other neighbouring regions.



Part 1: **The Building Blocks**

II. Objectives of decentralisation

By definition, decentralization results in the existence of multiple centres of power, organised geographically across the state, exercising part of the power of the state. Just as the centre draws its legitimacy from the people as a whole, so each of these sub-national units draws its legitimacy from the people in its geographic region, by whom it is chosen, whose interests it must serve and to whom it is accountable. Decentralization necessarily involves some diversity in rules, standards and procedures across the country, although the extent of diversity will depend on the model for decentralization that is chosen.

Decentralisation enables public power to be shared between the centre and sub-national groups, in circumstances in which each has its own claim to legitimacy and respect from the other orders of government. At the same time, because all belong to a single state, the stability of which is important to their own existence, they must all work collaboratively, within a framework that serves the needs of the people of the state as a whole.

Decentralization can address a variety of problems. Some of the most important include the following:

- **A tendency to authoritarianism on the part of the state.** Decentralisation requires power to be shared. It thus automatically diffuses power and provides checks and balances on central power as long, at least, as the logic of decentralization is accepted. For the same reasons, it can be a corrective in a political system under which election winners take all;
- **Tension and the potential for conflict within states with a diverse population.** Decentralization enables minority groups to enjoy a degree of self-governance; gives them a sense of ownership of the state as a whole and thus a commitment to it; enables minorities to acquire majority status in their part of the country, with all the responsibilities that goes with it; and provides the means through which political leaders of minority groups can play a formally recognised leadership role, thus providing them with the incentive to work constructively within the state;
- **The complexity of government.** By conferring suitable functions on sub-national levels of government, decentralization spreads the burden of government and enables the centre to focus on the most critical challenges and priorities, including for example, foreign affairs and international relations in an increasingly globalised world.
- **Lack of responsiveness** by the government to the needs and preferences of people throughout the entirety of the country. By empowering a level or levels of government closer to communities, decentralization puts government agencies in a position to respond to local needs. This characteristic is particularly important in states with a large population, a diverse population or a large geographical area;
- **Stagnation in approaches to government and policy development.** By creating alternative sources of governing authority, decentralization accepts diversity, enables policy competition and encourages policy experimentation, by enabling it to take place on a smaller scale;

III. The Building Blocks

The precise objectives of decentralization vary between states. As a generalisation, however, decentralization aims to distribute public power across and between multiple stakeholders. The aims of such a distribution of power can include: achieving more effective and responsive government; broadening access to government services and economic resources; encouraging greater public participation in government; providing a mechanism through which diverse groups can live together peacefully; and underpinning the stability of the state by persuading groups to share power within it.

Any decentralized state is based on a number of 'building blocks', which can be combined in various ways in the final design to achieve the overall objectives that are determined to be most critical. This section discusses the principal building blocks that should be considered when designing a model of decentralisation. The options within each, and the considerations that might guide the selection of particular options, are analysed in greater detail later in this Paper.



Configuration of different units

This first building block concerns how the decentralized system will be configured. This building block has two dimensions:

- **How many levels of government will there be?** By definition, there must be at least one sub-national level of government with which power is shared. The units that make up the level of government immediately below the centre are given a variety of labels: States, provinces, regions, cantons, lander. In this Paper, these will be called 'constituent units'. Most decentralized states have a third, more local, order as well. The units at this level are also given a variety of labels, including municipalities, districts, panchayats and villages. In this Paper, this level of government will be called 'local government'. One question that arises in many decentralized systems is whether the local level is a full partner in the decentralized arrangements, with its own degree of autonomy, or whether it is created and subject to direction by the constituent units;
- **How many constituent units will there be?** The answer depends on the circumstances of the state. However, experience suggests that a very small number of constituent units (ie. 2-3) may lead to conflict between the units themselves or between the units and the central state. Conversely, too large a number may mean that some or all units are too small to be viable.
- **Will all units be treated equally?** Consider whether all or only some units will be treated the same under the decentralizing arrangements or whether differential treatment (sometimes called 'asymmetry' in the literature on this subject) will be allowed.

Depth of decentralization

This important building block determines where on the spectrum of degrees of decentralization a particular system belongs. Again, it has several dimensions:

- **What autonomy will the sub-national levels of government have in the exercise of the powers assigned to them?** In any system of government, (all) governments must be accountable to the people who choose them and who they represent. However, the system will be less decentralized if the constituent units are also accountable in some way to the central level of government. Even where, as a general rule, constituent units are accountable only to their own people, in some systems that are less decentralized, central institutions may still have the power to intervene in emergencies or other extreme circumstances;
- **What kinds of power will be decentralized?** In all decentralized systems, at least some executive or administrative authority is allocated to the sub-national levels of government, most commonly, powers to enable local service-delivery. In deeper forms of decentralization, some legislative (and thus political) power and also, perhaps some judicial power, may be allocated to the units as well, giving them greater capacity to make and implement policy;
- **To what extent will the sub-national levels of government have fiscal powers?** By definition, all constituent units have some power to spend money, to achieve the basic objectives for which

they have been established. The issue here is the *source* of the money that they spend and, in particular, whether they can impose taxation and perhaps even borrow in their own right? If units cannot raise their own revenues, they will be dependent for them on the central state. In this case, their degree of de facto autonomy will be greater if their share of central-state revenues is guaranteed in the Constitution or in some other way.

Division of powers

Whatever the depth of decentralization, critical questions will need to be decided regarding the actual division of powers between the centre and the sub-national levels of government.

- **Which powers will be divided or shared?** Certain powers are almost always left with the centre, such as defence, immigration and international relations. Others are often given to sub-national levels of government, such as education, culture, housing and water. How this division of powers will be allocated depends on the depth of decentralization chosen. For example, if both the legislative and executive functions are decentralized, a constituent unit with responsibility for education will be able to make education policy as well as to implement it. If executive or administrative power alone is decentralized, education policies will be made centrally, but will be put into effect by the constituent units, possibly with local variations.
- **How will powers be divided or shared?** The sub-national levels of government will have greater autonomy if they derive their powers from the (national) Constitution rather than from central legislation that can be changed by the centre itself. If powers are divided by the Constitution, a range of technical but important decisions need to be made, including:
 - Should the Constitution list the powers of both the centre and the other levels of government, or should it list only the powers of one of them only?
 - Should any powers be exclusive to the level of government on which they are conferred?
 - Which level of government should have any powers that are not listed (sometimes called 'residual powers')?

Constituent unit constitution?

Another indicator of the degree of decentralization is provided by the constitutions of the constituent units themselves. In some systems, the constituent units have control over their own institutions, even to the extent of having their own constitutions. In others, the framework for government at the sub-national levels is prescribed by the centre or by the national Constitution.

Devices for shared rule

Mechanisms to encourage unity and co-operation balance mechanisms for autonomy in decentralized systems and can be particularly important in states with deep social divisions. Such mechanisms may take a variety of forms:

- Constituent units may be represented in central institutions. This happens most often in a second chamber of the central legislature (e.g. Senate, Bundesrat, Council of the Provinces), but unit representation can be found in other central institutions as well, including courts and cabinets (Saunders 2006:);
- Joint or shared institutions may perform functions for two or more levels of government. The Electoral Commission of Nigeria and the All-India Services (the civil service of India) are examples;

- Steps might be taken to positively encourage co-operation between levels of government on matters of mutual interest and to discourage conflict between them. For example, the Constitution of South Africa explicitly endorses the value of co-operative government;
- Proactive steps might be taken to develop a sense of solidarity between the constituent units. For example, arrangements may be implemented to 'equalise' the resources available to poorer units, as long as the richer units also accept that the extent of equalisation is fair.

Systems of government

Specific arrangements guiding decentralization are only part of the system of government for a state. Other aspects of the system will also have a bearing on the way in which decentralization works in practice, including:

- The relationship between the legislative and executive branches: parliamentary, presidential or semi-presidential. This determines, for example, the extent to which power is concentrated within each level of government and affects the modalities for the operation of co-operative arrangements.
- Whether any other form of power-sharing is prescribed or practiced. Power-sharing in other forms can contribute to a culture in which the limitations on the exercise of power that decentralisation involves is more readily accepted. Conversely, if power otherwise is concentrated, this should be taken into account in designing and implementing arrangements for decentralisation.
- The electoral system and the configuration of political parties. Majoritarian electoral systems give rise to dynamics that differ from those for proportional systems in ways that may affect decentralisation. Equally, the dynamics of parties that operate across the country differ from those that attract support only from particular regions or constituent units, in ways that may affect decentralisation.
- Mechanisms for protection of rights, including minority rights. Rights protection applies at all levels of government in a decentralised system. Minorities may change, depending on the level of government in issue. Questions arise about where and how rights are given legal effect and enforced.

IV. Typical challenges of decentralizing power

Any attempt to decentralize power in a state that formerly was centralized may present a range of challenges. The most common and critical of these are: (i) the challenges involved in reaching agreement on decentralization; and (ii) challenges of implementation. In practice, these two sets of challenges overlap, in the sense that many of the challenges of implementation are more manageable if they have been anticipated at the earlier, planning stage.

Reaching agreement on decentralisation

One group of challenges typically encountered at the outset of the process of decentralizing government involves the mindset of both the people in general and their leaders in particular. Proposals for decentralization may encounter resistance if the existing political culture of the state attaches importance to the idea that absolute final authority, or sovereignty, belongs to a particular institution (usually, the Presidency or the Parliament) or of an abstract entity (such as "the nation"). The prevailing culture may also favour assumptions such as: that all law must be uniform; that everyone must be subject to the same laws; or that citizens must owe loyalty only to the central state. All of these instincts can complicate the process of reaching agreement on decentralization.

Problems may be exacerbated by self-interest on the part of political leaders. Effective decentralization requires a commitment to cooperate by leaders at each level of government. Those at the centre, who may previously have exercised complete power and authority, will need to

relinquish some of it. Political leaders of minority or regional groups will need to exchange their struggle against the state or, in some cases, their struggle to secede from the state, for the opportunity to take part peacefully and constructively in the government of the state, through a sub-national order.

A second group of challenges concerns the choice of decentralized arrangements. The determination of the number and boundaries of the sub-national units is one of the most sensitive issues that will need to be agreed. In states in which the population is divided and there is latent or actual conflict, boundaries should be drawn in a way that helps to defuse tension, and ideally works to give dissident groups a sense of belonging, rather than deepening and entrenching divisions. On the other hand, the act of drawing boundaries in disputed areas can itself be productive of tension, particularly where the areas are resource-rich or there has been a history of population displacement. Iraq is a case in point, where resolution of the on-going dispute over whether Kirkuk should be incorporated into the region of Kurdistan depends in part on the “normalisation” of the population, itself disputed as a result of the forced population changes in the 1980s (International Crisis Group 2006).

Other difficult challenges of this kind concern the design of institutions. It may be necessary or desirable for central institutions to be redesigned to reflect the decentralized character of the state and the diversity of its peoples. Where the model for decentralization calls for the representation of sub-national levels of government in central institutions, there may be disagreement over whether they should be represented equally or represented in a way that reflects, wholly or in part, their proportionate share of the national population. In addition, where sub-national levels of government did not previously exist, their institutions will need to be designed from scratch. In such cases, it will be necessary to decide whether the sub-national institutions should match central institutions or whether sub-national levels of government should have freedom to design them differently. In one interesting compromise on this issue, the South African Constitution provides a constitutional framework for the provinces but authorises the provinces to enact their own Constitutions, as long as they comply with the national requirements. In designing sub-national institutions, it may also be critical to decide how minorities in each of the constituent units will be protected.

Finally, this second group of questions includes the core question of which form of decentralised power structure to choose, bearing in mind the particular circumstances of the state. The criteria for choosing a decentralized power structure are examined in greater detail in the Section V below.

A third group of challenges concerns the procedure by which decisions about decentralization are made. Which groups should be represented in the negotiations and by whom? To what extent should efforts be made to ensure that representatives reflect grassroots interests and preferences? Should the final decisions on decentralization be made by a national majority or national super-majority or by a process that also involves the constituent units in some way? The answers to these questions will affect the substantive outcome of any agreement on decentralization and set the tone for the implementation phase.

These problems are exacerbated where decentralization follows a prolonged period of conflict, for example, as in Sudan, Nepal or Somalia. To bring the conflict to an end, peace negotiations inevitably involve the principal protagonists (or combatants). Where, as in Sudan, decentralization is part of the solution to the conflict, negotiations over decentralization necessarily take place between military leaders. However, such leaders will not necessarily be adequately representative of the people, nor will they necessarily have the skills and vision to build a decentralized state and to run its institutions effectively, once peace is secured (Nouwen, 2007). The special complexities of designing decentralization in highly conflicted contexts requires special consideration and care.

Implementing decentralisation

Once a decentralized system has been agreed upon, the complexities surrounding actual implementation can still create problems. One of the most critical challenges of implementation stems from the need to establish new institutions. This requires an effort of political will that may be difficult to secure when new institutions are costly and affect existing power structures and entrenched interests. The establishment of institutions that enable the decentralization of power to the constituent units requires the centre to surrender power, financial resources and political patronage, in reality and not just on paper. Those in the constituent units will need a decision-making capacity that is independent of the centre, but will also need to be able to see their unit as a component of a larger state, to co-operate and collaborate in appropriate cases with central powers, and to participate actively in central institutions through which decentralized power is shared.

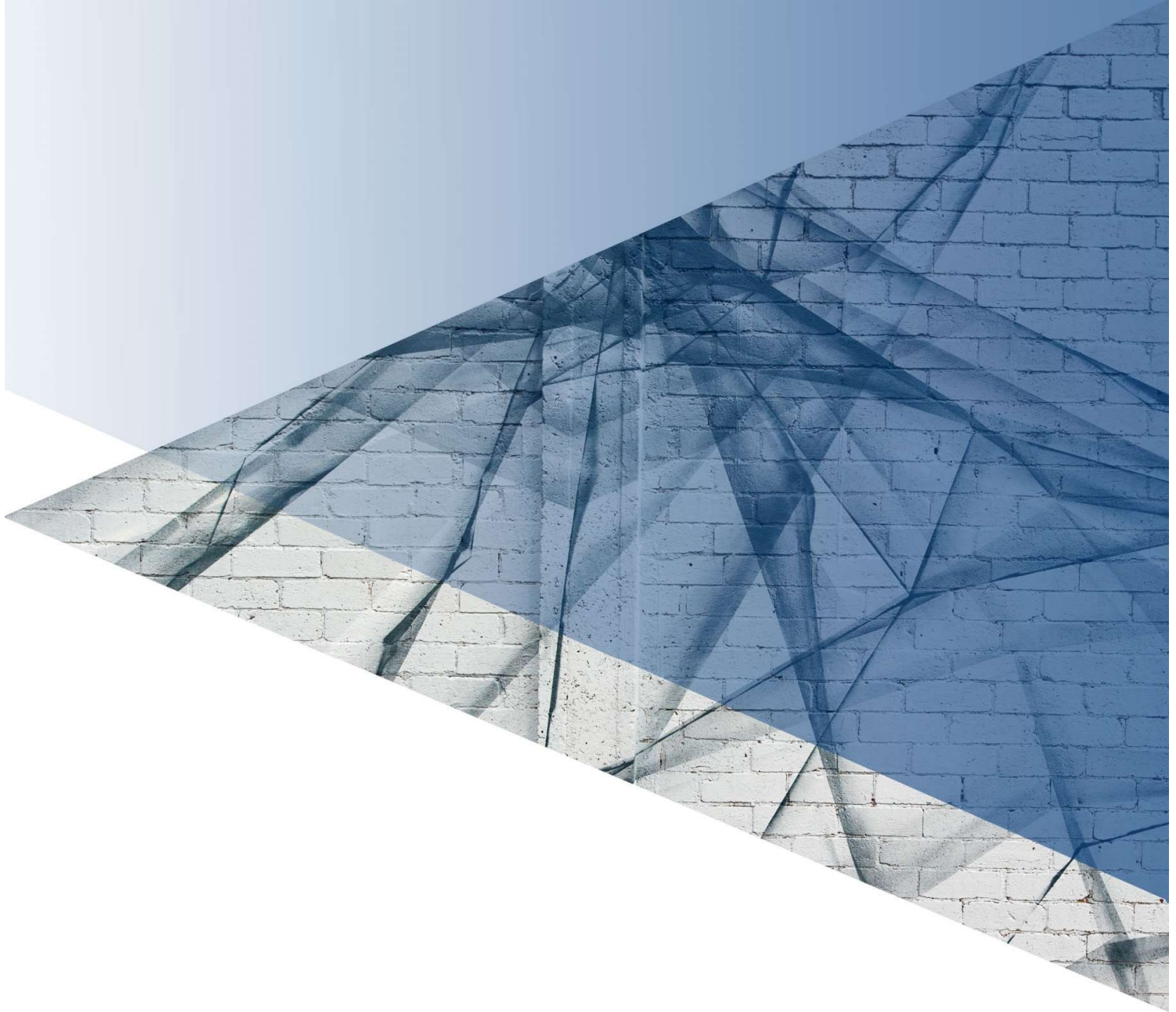
The establishment of independent and effective accountability mechanisms, such as courts, human rights commissions and audit bodies, which often accompany the introduction of decentralization, requires politicians actively to support the institutionalisation of bodies and systems that will check their own political power. This challenge may not materialise where decision-makers have a commitment to the success of the new regime. In other cases, scrutiny by civil society or the international community or both may be an important additional incentive.

Another common implementation challenge concerns the capacity of some or all of the constituent units. Lack of resources, lack of experience and skills, or simply unfamiliarity with what is practically required to run government often impede the capacity of constituent units to carry out the tasks entrusted to them under new decentralization arrangements. Where this occurs, the rationale for decentralization may be threatened and the stability of the arrangements undermined. Responses may include a phased transfer of power to the units affected, collaboration between unit governments or with the centre or, in severe cases, adjustment of the model.

The implementation challenge posed by capacity gaps may be particularly severe where decentralization takes place as a response to armed conflict, especially where the state has effectively collapsed, such as in Somalia. In such situations, there may be no governing institutions, no leaders with skills to govern in peace-time and a traumatised people, while at the same time, huge demands are placed on government to immediately provide services and infrastructure and establish law and order. Decentralization may be necessary in order to end the conflict and may be desirable in any event as an approach to governance in the medium and longer term. In the short term, however, it will place considerable strain on whatever limited resources exist. Targeted strategies that anticipate a lack of capacity at all levels of government are essential in this situation.

An implementation problem of a different kind concerns the need for power to be exercised in a way that itself supports the decentralization of power. To this end, it is helpful for political leaders and bureaucrats in both the centre and the constituent units to adjust their thinking and practices to the demands of sharing power. This is also the case with the judiciary, to the extent that disputes over decentralization come before them. This is particularly important at the beginning, as the new political culture is put into place and its content and boundaries tested. Leaders at the centre and those in the constituent units will need to be responsive to the needs of the people they are supposed to serve while being careful not to undermine the new decentralised system. For example, where the system allows central intervention to deal with emergencies, it is important that leaders at the centre resist the temptation to manufacture emergencies so as to justify intervention to reclaim power.

A final challenge of implementation is adequately to inform, involve and engage the people, organised nationally and in their sub-national units. The people are not only the principal intended beneficiaries of decentralization, but their active involvement and critical scrutiny can do much to make the arrangements work. Unrealistic expectations from the citizenry can risk dissatisfaction with the decentralization project, a particularly critical challenge in countries emerging from conflict. The public needs to be brought in as partners in decentralization, whose engagement with the newly developing institutions can serve to strengthen their capacities and commitment.



Part 2: **Design and Implementation** **Considerations**

V. Building Political Will: Obstacles and Incentives

Little or no progress can be made unless there is the will to decentralize among the relevant political leaders, with the support and encouragement of the peoples of the state. This first step towards a new set of decentralized arrangements may itself be difficult to achieve in the face of political and, sometimes, ideological obstacles. The political difficulties are obvious: decentralization requires those at the centre, who possess power, to surrender it. In some circumstances it may also require other political leaders to surrender their hopes, either to take over central power for themselves, or to secede, withdrawing from the power of the centre and creating their own independent state.

Ideology may present other obstacles to decentralization. Decentralization may challenge deeply rooted ideas about how the state should or must be organised, for example, in countries coming out of the British tradition of parliamentary sovereignty or the French tradition of national sovereignty. In some states, decentralization may have a bad reputation as a result of historical experience: the Dutch imposition of federalism in Indonesia in colonial times is an example (Ferrazzi, 2000); the use of Bantustans in South Africa under the apartheid regime is another (de V. Graaff, 1992). In other states, the threat of secession by one of the new constituent units, whether imagined or real, may seem to be an argument against decentralization, often feared as the first step towards the eventual break-up of the state.

On the other hand, the circumstances in which the centralized state finds itself may provide incentives to agree to decentralisation, under enlightened leadership. Conditions that help to create a climate favourable to decentralization may include:

- A major change of regime in a formerly authoritarian and centralized state, leading to a reaction against centralization as, for example, in Poland, following the collapse of communism in 1989;
- Recognition on the part of a central government that it can no longer maintain social stability or economic prosperity through central control, arguably the case in apartheid South Africa;
- Conflict, or the potential for conflict, within a state, for which decentralization offers at least a partial solution. Sri Lanka and Somalia are cases in point, though progressing decentralized arrangement continues to present considerable challenges;
- A threat of secession by part of the state, which might be defused by appropriate decentralization arrangements, as in Indonesia.

Further incentives to decentralize may, in some circumstances, come from intervention by the international community: the Dayton Accords of 1995, bringing an end to the conflict in Bosnia and leading to the federation of Bosnia-Herzegovina, are an example (Kiel, 2013). However, international intervention is not a substitute for local political will. As the current impasse in Iraq shows, it is important for the people and the political leaders in the state concerned to accept decentralization as a solution, to agree to a form of decentralization and to commit themselves to making the changes work (Al-Ali, 2014).

Popular support for decentralization may provide an additional incentive and, in any event, is sufficiently important to be considered essential in its own right. Public support should be based on public understanding, which, in turn, may require the provision of public information about decentralization. Equally important are public programs to deal with disinformation. Designing such programs to be as effective as possible is a challenge. Decentralization is a somewhat abstract notion compared with, for example, protection of human rights, or the choice between a presidential and a parliamentary system. The advantages of decentralization for people and their communities are difficult to explain in simple terms and its consequences are easily misrepresented. To overcome these difficulties, it will be found helpful to develop information that draws on any earlier tradition of decentralized or consultative decision-making; illustrates the advantages of decentralization with

practical examples; dispels misinformation clearly in concrete terms; uses examples drawn from other comparable states; and employs a range of media including, where appropriate, performing media.

VI. Designing decentralised arrangements

In reality, designing decentralized arrangements is an intensive, complex, challenging process. A range of issues need to be managed, both politically but also technically, to ensure that the model that is finally agreed upon has political buy-in but is also practically feasible and is capable of implementation taking into account the geographic, economic, social and other issues that characterize the national operating context. This section identifies a range of critical issues and processes that will need to be managed during the progress of designing, agreeing and managing a decentralization process.

Process issues: Who to involve?

Agreement within the state on the principle of decentralization is a start. The crucial next step is to agree on the form of decentralization, drawing on all the building blocks described in detail in Part 1 of this Series. This is a critical decision, which enables the new system to be tailored to the needs and circumstances of the state concerned. It is essential for all the relevant players to be involved at this point, including representatives of groups that may be in a minority in future constituent units. A critical practical consideration in reaching agreement on decentralized arrangements is: who should be involved? The answer depends on the circumstances of each case. In general, the parties should include representatives of contenders for power at the centre and representatives of what would become the constituent units in a decentralized state. Ideally, representatives of minorities should be involved as well, especially those potentially threatened by decentralization. The choice of a model for decentralization that takes the interests and perceptions of all groups into account may also help to overcome opposition to decentralization.

In practice, the answer may be more complicated. Where decentralization is sought as a solution to conflict, it will be necessary to include the principal protagonists in negotiations. However, their demands will not always coincide with the most rational division of the state into regions for the purposes of decentralization. Regional representatives also may resist the inclusion of other parties, including representatives of minority groups in their regions. Similarly, important players may refuse to participate or may withdraw from discussions if their demands are not met. Negotiation, mediation and compromise can help to resolve some of these challenges, as long as the will to do so exists.

Design Issue #1: What should the arrangements be called?

At one level, this question may seem unimportant. However, in some cases, the question of what to call the new arrangements has been an impediment to agreement on decentralization itself. In some states, of which South Africa has been an example, references to federalism are unwelcome. In others, it may be that agreement cannot be reached unless the terminology of federalism is used. Present-day Belgium is an example of state in which the federal character of the country is important.

Federalism comes in very different forms, and the degree of decentralization does not necessarily depend on the formal classification of the state as federal or unitary. A wide range of different labels currently attach to states that are undoubtedly federal or at least decentralized to a degree that has significant constitutional protection. Canada and Switzerland are formally described as “confederal”. India describes itself as a “Union of States”. South Africa is the “Republic of South Africa”. The Constitution of Indonesia describes the state as “unitary” but also provides for extensive regionalisation.

However, whatever term is adopted to describe the form of the state, it must not mask disagreement about the degree of decentralization that has been adopted in fact, and for which the Constitution and the rules and practices associated with it provide. In the absence of agreement about the extent of the authority of the sub-national orders, there is likely to be inappropriate interference with sub-national autonomy by the centre over time. Such interference in turn is likely either to cause conflict or to discourage the sub-national orders from taking responsibility for their own affairs, thus negating the goals of decentralization.

Design Issue #2: How many constituent units with what boundaries?

In designing any decentralized system, attention must be paid to the number of regions, the bases on which their boundaries are drawn and the mechanisms for changes in boundaries and in the number of regions over time. The solutions will depend in part on the circumstances of the decentralized state. However, some guidance can be drawn from experience.

First, all else being equal, it is desirable to avoid having either a very small number of regions (2-3) or a number that is too large for the state concerned. The former may create one or more over-powerful units that challenge the central state itself, as in Nigeria, immediately following independence, where one of the three regions covered three-quarters of the territory of the decentralized state (Watts, 2008). The latter may cause the creation of regions that lack capacity and that are too weak in their dealings with a correspondingly more powerful centre.

Secondly, while it is desirable for regional boundaries to be drawn on a basis that corresponds with communities of interest, it is desirable to preserve some bonds that cross regional boundaries as well. Regional boundaries should not correspond with all the lines of division between communities, although they may usefully correspond with some. Ideally, particular discrete communities should not be entirely isolated within a single region. India is a useful case study for this purpose. From 1956, the boundaries of the Indian States were redrawn largely along linguistic lines. On the other hand, the largest language group, Hindi, is spread across a number of states; there are minority language groups in many of the states; and with some notable exceptions religious divisions are not linked to state boundaries.

Legislating for decentralisation

Some decentralization arrangements may not be included in the Constitution or may be included only in a form that empowers the creation of constituent units and the conferral of power on them. In these circumstances, implementation depends on an enactment of implementing legislation by the centre. The political considerations that drove the centre to negotiate decentralization in the first place may provide sufficient incentive for compliance. As an additional safeguard, however, consideration should be given to setting out at least the timetable for compliance in the Constitution or in an interim Constitution.

In principle, the process for redrawing boundaries in a decentralized state should require the involvement of both the affected regions and the centre. However, the extent to which the territorial integrity of the regions (Kincaid, 2005: 436) is protected is likely to depend on the depth of decentralization. In deciding on procedures for redrawing regional boundaries it is desirable to balance the advantages gained from a flexible configuration against the desired goals of greater regional autonomy. In India, the dominance of the centre over decisions about state boundaries under Article 3 of the Constitution has been useful (Dhavan and Saxena 2006: 168). In Nigeria, the arrangements for territorial redistribution has led to a proliferation of states and weakened the federal form of the state (Osieke 2006: 202).

Finally, where territory is disputed and the process of drawing boundaries has the potential to give rise to further conflict, it is necessary to consider additional steps to reduce the tension and to seek a peaceful solution. Depending on the circumstances, these may comprise a boundaries inquiry, constituted in a way that is agreed by the parties, as with the Abyei Boundaries Commission in Southern Sudan (USIP 2005) or a process to stabilise the population before a final territorial solution is found, as contemplated by the Constitution of Iraq for the disputed city of Kirkuk (International Crisis Group July 2006). In extreme cases, as in Brcko in Bosnia-Herzegovina, the situation may call for the creation of a special status for the disputed area in the short or medium term, possibly involving the use of international territorial administration (Wilde 2001). This cannot be a final solution, however, and steps should be taken to normalise the situation of the area over time, as indeed has been attempted in Brcko (OHR 2006).

Design Issue #3: What governance and electoral system or systems?

Decentralization arrangements can be combined with any of the classical structures for the relationship between the legislative and executive branches within each order of government: presidential, parliamentary or semi-presidential. Whichever option is chosen, it is common for that structure to be used by both the centre and the constituent units; however, it is not necessary for the systems to be the same. A parliamentary system makes it easier for the constituent units to be represented as ministers in the central level of government. If executive power is concentrated in a president, it may be necessary to design the electoral system in a way that ensures that the president attracts more than bare majority support from across the constituent units, as in Nigeria (Osieke 2006:). In either case, reliance on the majority principle in forming a government may be in some tension with the culture of power-sharing that decentralization assumes. Switzerland offers an example of how power-sharing in the central government, through the Federal Council, can complement decentralization. In Switzerland, on the other hand, power-sharing is coupled with extensive use of direct democracy.

Decentralization arrangements can also be combined with any electoral system. In practice, the choice of electoral system may be significant. Proportional representation may ensure greater diversity of representation in both central and sub-national institutions, which in a divided society may complement the use of decentralization as a mechanism to assist communities to live in peace. Some electoral systems may be more likely than others to encourage the emergence of regional political parties or to produce different majorities in different orders of government, affecting the dynamics of the relations between orders of government;

Design Issue #4: How can minority rights be protected in a decentralized state?

An advantage of decentralization is that it enables national minorities to become majorities in parts of the country, giving them a degree of autonomy in governance and a stake in the state as a whole. On the other hand, it may also raise questions about the position within each of the regions of minorities, who may be members of other national minorities or members of the national majority.

There are two standard ways of dealing with this challenge, which are not necessarily mutually exclusive. First, if the minorities within regions are territorially concentrated they can be given a degree of autonomy in governance within their local area. This might cover matters that can effectively be handled locally and in particular over matters that cause their communities particular concern. For example, depending on the circumstances, a minority community may prefer to have control over local policing. Other kinds of structural protection also may be useful in these circumstances. Power-sharing within the region, guarantees for minority representation in regional institutions and protection of equitable shares of regional resources are examples (Kincaid, 2005: 422).

Secondly, the rights of minorities can be directly protected, through regional rights instruments, if any, as well as through national constitutions enforced by national institutions. Protection may be derived through the individual rights of freedom of religion, speech, association and thought (Kincaid, 2005: 422). Additional protection may be offered through individual or group rights tailored to the circumstances of the minorities of the state concerned. In some cases, as in India, power may deliberately be reserved to the central order of government, to make laws to protect particular minority groups (Majeed 2005:190). In determining the scope of protected minority rights, a balance needs to be struck between respect for the preferences of the regional majority and legitimate minority rights and interests. In a decentralized state where the regions are linguistically defined, for example, members of a linguistic minority will not necessarily have a right to use their language for official purposes.

Design Issue #5: How can decentralization help to manage conflict?

Ethnic, regional or religious conflict may be managed through decentralization. Sudan is an example, where a peace agreement provided autonomy for Southern Sudan within what was then a single united Sudan (before a referendum led to the secession of South Sudan) and brought to an end a bitter civil war (Nouwen, 2006). Indonesia is another example, where the long-running conflict in Aceh was concluded with a Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh movement. In this document it was agreed to enact legislation to give Aceh authority in relation to all matters except foreign affairs, external defence, national security, monetary and fiscal matters and freedom of religion, 'within the unitary state' of the Republic of Indonesia. Similarly, in Papua New Guinea, a peace agreement led to the constitutional recognition of the Autonomous Region of Bougainville, which was given special status compared with the remaining provinces of PNG, in order to bring to an end a decades-long civil war. As these latter two examples demonstrate, decentralization may be used as a means of settling long-standing claims for autonomy within a single state. Significantly however, the peace agreement in Sudan led to the eventual creation of a secession of the autonomous southern state and the creation of the new country of South Sudan.

More generally, decentralization can provide minorities an immediate sense of ownership of the state and of belonging to it, by providing them with an opportunity for self-government. On the other hand, as in Bosnia-Herzegovina (International Crisis Group 2007: 15), decentralization can also deepen and entrench divisions, unless balanced by measures to identify common interests and strengthen unity. Apprehension about the effects of decentralisation on national unity is one of the factors impeding resolution of the complex conflict in Sri Lanka (International Crisis Group 2007 (2):15). A range of measures are available to offset any threat to the unity of the state from decentralisation. Depending on the circumstances, these include regional representation in national institutions, power-sharing in political and administrative bodies at the centre; a distribution of national resources on a basis that recognises the claims of both poorer and richer regions and that provides for revision over time; active encouragement of unity on the part of the international community, or sections of it.

In an interesting innovation in Nigeria, a constitutional 'federal character principle', monitored by a Federal Character Commission, is designed to ensure that, in the terms of section 14(3) of the Constitution, "there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in the [central] government or any of its agencies" (Ebere, 2006, 212). The operation of this principle in practice has been affected by its restriction to the indigenous residents of the Nigerian regions, discriminating against those who have moved from their traditional region, fuelling further conflict (International Crisis Group 2006: 11). Nigerian experience thus suggests the need for care in defining ethnicity for the purposes of a principle of this kind.

Design Issue #6: What will it cost?

Any decentralization project has cost implications, the extent of which will depend on its design. One obvious cause is the need to create additional institutions for each of the constituent units of government: legislatures, assemblies or councils comprising elected representatives; administrative bodies; sometimes electoral commissions or other independent agencies. Another potential cause of additional costs comes from the impact of larger numbers of elected representatives, to the extent that this creates opportunities for inefficient patronage, pork-barrelling and corruption. There may also be additional costs associated with establishing sub-national bureaucracies. In this context, it is important to take into account the human capacity of the future constituent units. Where there are capacity gaps, these can be developed in the course of implementation of decentralized arrangements, but it is important for the need for such capacity development to be foreseen and adequate plans for addressing it have been made.

If decentralization works well, direct costs may be offset by enhanced economic performance and more effective delivery of services. In any event, direct costs can be minimised in several ways:

- Once decentralization takes place, it is unnecessary for the centre to maintain a large administration in areas that are the responsibility of the other orders of government, although it may need to retain sufficient capacity for the purposes of monitoring and co-ordination;
- It may be cost-effective to establish some joint institutions to serve all levels of government. Examples include the All-India Services and the specialised Commissions established by the Constitution of Nigeria. Joint institutions are likely to have a centralising effect, however, and will not be appropriate for all decentralized states;
- The numbers and scale of new institutions, either at the centre or in the constituent units, should be kept within reasonable bounds. Consideration might be given to performing some functions on a part-time basis;
- Accountability mechanisms should be established to minimise waste and corruption.

Finally, considerations of cost should be taken into account in determining the number of constituent units. The larger the number, the greater the additional costs. While direct costs can be offset by the gains from decentralization, at some point the proliferation of units becomes counter-productive. If there are too many units, moreover, some or all may lack the capacity to perform their functions effectively, tempting centralization. Nigeria is a case in point, where the number of states increased from three in 1946 to 36 states and 774 municipalities by the first decade this century (Ebere 2006).

Design issue #7: How will revenues be managed?

In many decentralized systems, it is desirable for the authority to raise revenue to be decentralized, in order to reap the maximum advantages of greater autonomy at the local level. In almost all systems, however, there will be a degree of decentralization from the centre to the other orders of government and in many cases it is likely to be considerable. In most systems, there is likely to be a system for revenue redistribution from the more prosperous to the poorer regions, to enable the whole state to share comparable or at least basic standards. Both forms of redistribution create tensions, between the centre and the regions and between the regions themselves. A further complication is added where valuable resources are located in particular regions, leading to claims for a share from non-resource regions, which may be regarded as unfair.

Nigeria is a case in point. There, the centre has exercised control over minerals since independence. Originally, however, a substantial share of resource revenue was returned to the regions from which the resources derived. Now, that share is small and the other regions have become dependent on redistributed revenue. The result is significant unrest in the Niger Delta, from which much of the oil emanates, but which otherwise is poor and undeveloped. The problem is exacerbated by corruption

at all levels (International Crisis Group 2006: 4-8). Negative lessons can be drawn from Nigerian experience. They suggest that there may be advantage in enabling resource-rich states to retain ownership of a proportion of their resources; in vesting the remainder in the centre, to be used for the national benefit; and in encouraging non-resource regions to develop revenue-generating activities of their own, so as to reduce their dependence on revenue redistribution (International Crisis Group 2006: ii).

Timetables: Transitions and Compliance

A practical consideration of a different kind concerns the timetable for decentralization. A key question here is the period over which the transition from centralized to decentralized state should occur. The answer depends in part on whether there are any existing institutions in existing regions to which power can appropriately be transferred. If not, both regions and institutions will need to be established and the transition may take some time. However, care should be taken that the interval is not so long as to lose the momentum of the movement towards decentralization. It may be useful in these circumstances to consider a phased transmission of power. This might involve either the progressive conferral of power on all units as the sub-national level acquires capacity or the conferral of power on stronger units before others that lack the adequate capacity to exercise it. Whether either of these options is possible depends on political as well as practical considerations. In any event, a staged transferral of power of either of these kinds should not continue indefinitely. In the interests of the stability of the decentralized state, a date should be set by which the transfer is required to be completed, and strategies devised to build the capacity of the units in the interim.

One further question concerns compliance with the timetable for decentralization and with the arrangements for decentralization generally. In many states, the framework for decentralization is set out in a Constitution that is superior law. In cases of this kind, compliance with the Constitution ensures compliance with the arrangements for decentralization. If disputes about the meaning and application of the Constitution arise, the final arbiter usually is a Constitutional Court or a general court of final appeal. Even in these circumstances, however, political will remains significant, as the courts are themselves dependent on the executive to put their decisions into effect.

VII. Implementing decentralised arrangements

Coordination: How can the different levels work together to maximize efficiency?

By definition, in a decentralized system, each level of government has responsibility over particular aspects of government activity, for which it is responsible to the people, or to a group of them. Nevertheless, each level of government carries out its responsibilities within the same state and co-ordination is often useful and appropriate. There is a range of possible mechanisms through which co-ordination can be achieved. These include a chamber of the central legislature in which the constituent units are represented; regular formal or informal meetings of representatives of each of the governments, to exchange views, co-ordinate policies and develop plans for joint action; a shared public service, as in India; and shared institutions of other kinds, of which electoral commissions are an example, as in Nigeria (Saunders 2006). Some of these arrangements have the additional advantage of enabling the constituent units to contribute to central decision-making although care must be taken to ensure that they do not encourage a degree of centralisation that undermines the devolution of power in the state.

Accountability: How can corruption be tackled?

There is no necessary correlation between corruption and decentralization: (Freille, Haque and Keller, 2007: 7, 16). Corruption is a problem in many states, centralized and decentralized alike. However, decentralization may increase the opportunities for corruption: more governments means more

centres in which political power is exercised; decentralization can blur lines of accountability for the exercise of power; and local officials may more easily be controlled by corrupt local interests, than in a more centralized system.

There are no easy solutions. As a generalisation, however, corruption is best tackled through transparency, strengthening avenues for accountability, and active public participation and awareness. In the context of decentralized systems, this requires clear lines of accountability to be established for all levels of government, and suggests the need to limit the authority of the centre to intervene in the exercise of power by sub-national orders. It also suggests that responsibility for the raising and use of public funds and for regional economic development should be decentralized. For the same reasons, decentralized systems should be designed to enable competition between sub-national units, through which effective governance can be encouraged and corruption exposed. This requires a common market in which people, capital and industry can move between regions. It also requires that mechanisms for revenue redistribution reward good governance and avoid compensating for poor performance, particularly where the latter is caused by corruption (Parikh and Weingast, 1997).

It is unlikely that either mechanisms for accountability or a culture of accountability will exist within sub-national orders of government. When a previously centralized state introduces decentralized arrangements, both will need to be established. Developing a culture of accountability in a new polity, with new institutions, represents a formidable challenge. Attention should be paid not only to the attitudes of elected representatives and administrators, but also to those of the public to whom they will be accountable. The latter requires information, education and effective electoral democracy. It will also be promoted by opportunities for active public participation, of which participatory budgeting, as used in Porto Alegre in Brazil, may be an example (Litvack and Seddon, 1999: 8, 15).

Participation: How can decentralization more effectively engage the people?

Decentralization naturally increases participation, in some obvious ways. More governing units mean more opportunities to take part in governing as representatives and more occasions to exercise electoral choice. In some states, decentralization offers national minorities the chance to govern in some parts of the country. The availability of sub-national government structures assists the participation of those unable to attend national institutions further from home (for example, family responsibilities often block women's participation in national institutions). However, the opportunities for participation that are presented by decentralization can also be lost, unless they are explicitly valued and deliberately developed.

Decentralization should be paralleled by efforts to expand and enliven democracy at more local levels. Groups that have not hitherto participated in governing institutions should be encouraged to stand for election or appointment. The use of quotas to ensure that decentralization significantly increases participation in this way is one option. In India, for example, changes to the Constitution in 1992 required one third of the seats in each local government unit or *Panchayat* to be reserved for women and additional seats to be reserved for members of the scheduled castes, in proportion to the numbers of their people in the area, one third of which must be reserved for women of the scheduled castes. In addition, the Constitution requires one third of the positions of chairperson at each level of the *Panchayat* in each state to be reserved for women and a proportionate number for the scheduled castes (Constitution of India, 73rd Amendment, section 243 C). These and related initiatives have undoubtedly been successful in increasing the representation of both women and disadvantaged communities in local governance in India (Dhavan 2006: 188).

In addition, measures can be taken to increase participation of the people at large, as voters, recipients of public services, taxpayers and members of civil society. Mechanisms include fair and regular local elections, where political power has been decentralized; opportunities for public input into local decision making processes; and a systematic flow of information between public institutions and civil society (Litvack and Seddon 1999: 15). As in any other context, measures to enhance public participation must be balanced with other important attributes of a system of government, including the stability of government and the capacity for effective policy-making and economic management.

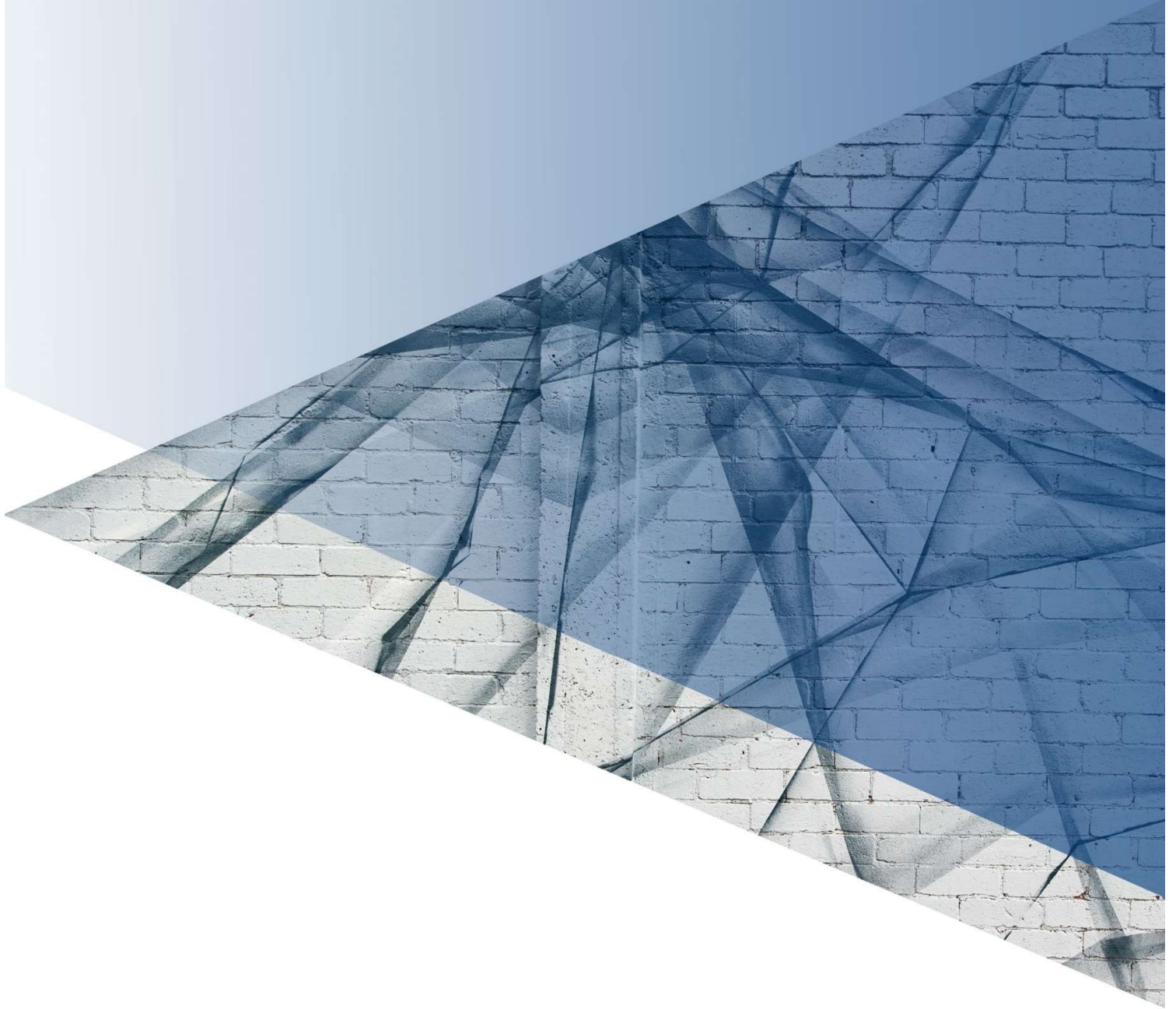
Building capacity: How can each level of government be strengthened?

The capacity of all orders of government is critical to the success of decentralization. All institutions of government must have the capacity to perform the responsibilities allocated to them, in a manner that serves the long-term goals of decentralization, including the deepening of democracy, the enhancement of responsive and accountable government and the management of conflict. The challenge may in part be met by drawing on the private sector in relation to certain public functions, of which infrastructure development is an example (Litvack and Seddon 1999: 66-71). Even in this case, however, institutional capacity is required to enable the public institutions to manage their relationship with the private bodies.

Capacity is a particular challenge at the time when a previously centralized state becomes decentralized. At this point, there may be little or no capacity in the newly created sub-national orders of government and little conception of what is required, in terms of policy making, administration, service delivery and accountability. The greater the degree of decentralization, the greater this challenge is likely to be. Where, as is usually the case, political power is also decentralized, creating a need for elected local representatives as well as local administrations, there is a further question about how regions will be managed until the first regional elections can be held.

The possibilities for dealing with these challenges depend on the circumstances of the country. An obvious possibility is to transfer to the regions the officials who dealt with the transferred responsibilities when they still lay with the centre. If this approach is taken, it may be necessary to take steps to ensure that such officials develop attitudes and practices that are suited to their role in a different order of government. An alternative in states where sub-national structures already exist in some form is to use these as the base on which to build capacity in the newly created regions. This approach was taken in South Africa, where some of the administrative resources of the new provinces were drawn from the *bantustans* created under the old apartheid order. As the South African case also shows, however, this solution will not necessarily be effective. Where the previous sub-national orders themselves lacked capacity, transfer of officials to the new decentralized structures may cause a continuing need to build capacity to be underestimated.

Another solution is to handle capacity building as part of the process of transition, in which responsibilities are transferred over a period of time as capacity develops. In order to ensure that this approach does not become an excuse to delay decentralization, a clear time-frame may be set within which decentralization will be completed and strategies put in place to actively build capacity in the meantime. Where necessary, the latter may call for assistance from the international community, to build capacity on particular matters.



Part 3: **Decentralisation Models**

VIII. Model 1: A High Degree of Decentralisation

Model 1 describes decentralization arrangements that involve a high diffusion of power between different levels of government. This model involves at least two levels of government, the centre and a number of constituent units, although a more local order of government may be a partner as well. The number of constituent units will depend on the circumstances of the state. Ideally, there will be more than two or three, but not so many as to make the process unmanageable. An overriding consideration is the question of the viability of each of the units as a mini-government, in terms of whether each unit has the human and financial capacity to fulfil the responsibilities conferred on it. Ideally, the units should be roughly equal in capacity, but in practice this may be difficult to achieve as decentralization is often a response to the neglect of particular regions or groups by the central government resulting in weaknesses in their existing capacities to bring government to the people.

This model divides legislative, executive and sometimes judicial authority between the centre and the constituent units, and protects the division in the national constitution. The centre makes and administers laws within its areas of responsibility, and the constituent units do the same. The constituent units have autonomy in the exercise of their powers. They are likely to have authority to raise and spend their own revenues and considerable discretion in designing their own institutional arrangements. They may have constitutions of their own, subject to a requirement that these are consistent with the national constitution. Under such a model, each level of government is responsible to its own people for the exercise of power and the delivery of services.

This kind of model of decentralization is a federation of the kind found in many countries, including the United States, Canada, Australia and Argentina and, with some significant variations, India, Malaysia and Nigeria. The effect of this model is that the constituent units have autonomy to govern within the subject-areas assigned to them and the authority of the centre is correspondingly less. There may be substantial differences in laws, institutions, and administrative arrangements between constituent units. In practice, each citizen belongs to at least two orders of government, each of which is accountable to the people they are designed to serve. The extent of decentralization under this model means that it is more likely to be found in states where the constituent units previously existed as separate entities. However, there is no reason why this model cannot be created in a previously centralized state, if this is the preferred model of decentralization.

While this model is highly decentralized in design, it does not always work that way in practice. As the questions below demonstrate, practical outcomes depend on a range of factors. Some of them are constitutional or legal: the extent of the power allocated to the constituent units; the extent of their fiscal independence; the extent of central control over unit institutions through the national constitution; the extent of any central power to intervene in unit affairs. Political factors also are important: the alignment of governing majorities at the centre and in the units; the political and economic strength of the units vis-à-vis the centre and each other. The degree of actual centralization can change over time, in response to external pressures or internal problems or tensions. Judicial interpretation is an additional force for change: the balance of power in states that appear highly decentralized on paper may change over time as central powers are progressively expanded by judicial decisions on the validity of central or sub-national laws.

Many questions of important detail need to be resolved in designing a model of this kind. They include the following:

(i) Which powers should be assigned to which level of government?

As a general rule, constituent units should have only those powers that can be exercised effectively within their respective borders, without affecting neighbouring units or the interests of the state as

a whole. On this basis, culture, health, education, housing, policing, local business regulation and agriculture are typically powers of the constituent units; defence, international relations, national and international trade and commerce, foreign investment, receipt of foreign aid and immigration are typically powers of the centre.

The general rule is a useful starting point. In practice, however, the allocation of powers may be more complex because all levels of government are likely to have an interest in the way in which others exercise their powers. Natural resources (oil, gas, timber) can be developed by the constituent unit in which the resources are found, but distribution and export may require support from the central level of government. Education is primarily a local service, but a central government may have a legitimate interest in raising the skill levels of the people as a whole. Health can also be seen as a local issue, but the cost of providing hospitals and doctors may demand national planning to achieve economies of scale. These and a host of similar questions show that co-ordination of some kind will always be necessary between the centre and the constituent units, and between the constituent units themselves, whatever form the division of powers takes.

Notably, there is almost always a third, more local order of government in a system of this kind. One question here is whether the structure, powers and resources of local government should be constitutionally protected or whether these should be left for decision by the constituent units? The former option strengthens local government, at the expense of the power of the constituent units. Paradoxically, it may enhance decentralization, in the sense of expanding the opportunities for local participation and enabling more effective delivery of services at the grass-roots level, while undermining it at the same time, by weakening the middle order of government and thus augmenting the power of the central state.

(ii) *Should the constituent units be able to impose their own taxes and, if so, which ones?*

In principle, it is in the interests of accountability for governments that spend money to have the responsibility for raising it in the first place. In this case, however, there remains the question of which tax powers should be exercised by the sub-national levels of government. The general rule is the same here as in relation to the assignment of other powers. The constituent units should be given forms of taxation that can be raised and collected within the borders of the units concerned. On this basis, property taxes are suitable for lower levels of government because they are obviously local in character. Sales taxes and some income taxes may be able to be imposed locally as well, although population mobility is likely to cause some difficulties in both cases. Customs duties by contrast are typically national in character. The centre is likely also to have responsibility for national economic management, which will give it an interest in taxing and spending, again requiring co-ordination between governments.

If the constituent units do not have their own tax powers, they will be dependent on revenues raised by the centre. In this case it is desirable to guarantee their share of national revenues in some way, either by protecting it in the national constitution or by establishing a transparent and reliable process for the allocation of national revenues each year. It will also be necessary to decide the basis on which revenues are distributed between units. Even if the constituent units have some tax powers, it will be necessary to pay attention to revenue redistribution, for at least two reasons. First, local tax powers may not be sufficient for local needs, making the other levels of government dependent on the centre for part of their revenues. Secondly, some constituent units will have greater revenue-raising capacity than others, for example, in oil-rich areas. Considerations of solidarity and equality suggest that, in these circumstances, there should be some transfer of revenues from the richer to the poorer units to ensure all citizens can access the same basic level of services.

(iii) How should powers be divided?

This is a technical question, which may have considerable practical importance. Three of the most common options are set out below:

- One approach is to list the powers of the centre, leaving the rest to the constituent units. In this case, a decision needs to be made about whether some or all of these powers are exclusive to the centre, or whether they are 'concurrent' powers, in the sense that they can also be exercised by the constituent units;
- A second approach is to provide two lists of (generally) exclusive powers, for the centre and the constituent units respectively. In this way, the core powers of each level of government have some protection from encroachment by the other;
- A third approach is to have three lists of powers, two of them identifying exclusive powers and the third comprising concurrent matters, exercisable by either the centre or the constituent units.

Whichever of these options is chosen, it will be necessary to decide two further matters. First, which level of government should be entitled to any powers that are not listed in the Constitution (on the assumption that it is impossible to list everything that governments might need or want to do)? Secondly, what should be the rule for resolving conflict or inconsistency in the exercise of power by two levels of government? Usually, in these circumstances, the central exercise of power prevails, but the opposite rule applies under, for example, the Constitution of Iraq.

In a decentralized model of this kind, the constituent units may (although they need not) have constitutions of their own. A constitution for a constituent unit may provide protection for the rights of individuals and groups within the jurisdiction against infringement by the institutions of the constituent unit. There will also be a national constitution, however, which usually also protects the rights of people in the state against infringement by both national and sub-national institutions. National rights protection may be particularly important for the rights of minorities within constituent units.

(iv) Should there be any circumstances in which the centre can intervene in the areas of responsibility of the other levels of government?

The circumstances in which a need for intervention might, arguably, arise, include national or local emergencies or the systemic failure of government in a constituent unit. If a power of intervention is provided, it is necessary also to provide safeguards against its inappropriate use. Mechanisms for this include the involvement of the central legislature in decisions to intervene, including any chamber of the legislature that represents the constituent units; a time limit on the period for which central intervention can last; clear and limited criteria for the exercise of a power of intervention; and authority for the courts to review the lawfulness of decisions to intervene.

Not all federations provide a power for intervention by the centre. The alternative is to leave concerns about the performance of the constituent units to the people to whom each unit is accountable and to assume that any emergencies that arise can be resolved within the framework of the normal division of powers or by collaboration between the orders of government.

(v) How should the courts be organised?

Under this model, each level of government has its own legislature, executive and administration. However, there are a variety of different options for dealing with courts. For example:

- Each level of government can have its own system of courts (as in the United States). This option deepens local autonomy further. It may also assist to accommodate differences in legal systems between constituent units. On the other hand, it adds to the complexity of the judicial system, in

ways that may be inconvenient to litigants, unless there is considerable co-operation between court systems;

- A single system of courts can be created, as in Canada, to adjudicate cases in relation to all levels of government. In this case, responsibility for the courts should be shared between the centre and the constituent units in some way.

In either case, there will be a question which court or courts should be able to deal with constitutional questions. In some states, this is the responsibility of all or most courts, with a general apex court acting as the court of final appeal. In others, the function of judicial review may be carried out by a single constitutional court specifically established for this purpose.

(vi) What mechanisms should be used to reinforce the unity of the state?

Any system of decentralization requires a mixture of local autonomy and national solidarity (sometimes referred to as a mixture of “self-rule” and “shared rule”). Most of the discussion so far has dealt with mechanisms for creating local autonomy. The need to reinforce unity is also important, however. Two mechanisms are considered here:

- The constituent units can be given a voice in central decision-making. Usually this is done through a “federal” chamber of a bicameral central legislature. One further issue to be decided in this case is whether the units should be equally represented, reflecting their symbolic equality, or whether representation should be adjusted by reference to population, giving greater effect to democratic principle. It is possible to give the constituent units representation in other central institutions as well, including the executive branch, the army, the bureaucracy and the courts;
- A mechanism of a quite different kind may be to provide a guarantee for the mobility of people and commercial activity throughout the decentralized state. While mobility is desirable in principle, care should be taken to ensure that it does not threaten the consensus on which the state is built and the peaceful co-existence of its peoples.

Case Study Model 1: India

Configuration

- In addition to the central level of government (the Union Government), India has 28 states and 7 union territories. One state, Jammu and Kashmir, has greater autonomy than the others, for historical and political reasons. The union territories are directly ruled by the centre. The relationship between the centre and the states is a federal relationship.
- India has additional local levels of government. Outside the urban areas, there is a two or three-tiered system of *panchayats*, with the village as the smallest unit. In urban areas, there are forms of municipal government. Power is devolved to the local levels of government by their respective states in a way that is now structured, at least in theory, by sections added to the Constitution in 1991, providing a degree of protection for local self-government.

Depth of decentralization

- The Indian states do not have their own constitutions, but are structured in accordance with the national Constitution.
- The Indian states exercise both legislative and executive power, and also administer some federal legislation.
- The Indian states have their own legislatures, their own executive government and some public service departments of their own. There is a common system of courts in which the lower courts are controlled by the states and the higher courts by the central government.
- Part of the public service is shared, through the All India Services, to which officers are centrally appointed but under the operational control of the state to which they are assigned.

- The Indian states impose some local taxation, including some excise taxes, sales taxes, stamp duties and entertainment taxes. They also share in some central revenues, including income tax and central excise duties, under decisions made by the Finance Commission.
- There are some unusual limitations on the autonomy of the Indian states, which make India a heavily centralised example of Model 1. In particular, the Governor of each state is appointed by the President of India and the centre may intervene in state affairs in a range of emergency-type situations, under constitutional procedures that have often been abused. The boundaries of the Indian states also may be altered by the central legislature, following consultation with the legislatures of the states concerned.

Division of power

- The Indian Constitution divides power between the centre and the Indian states in accordance with three lists of legislative powers. Two lists identify the powers that are exclusive to the centre and the states respectively. A third list identifies concurrent powers, which can be exercised by both levels of government, although if there is a conflict between central and state law, the former will prevail. Central laws made under the concurrent powers generally are administered by the Indian states.
- Amongst the 97 exclusive powers in the central list are: foreign affairs, defence, citizenship, transport and communication and banking. Exclusive state powers include: public order, local government, public health and sanitation, roads, water, land and gas. Concurrent powers include: criminal law and procedure, family law and planning, civil law and procedure, economic and social planning and education.

Devices for shared rule

- India has a variety of mechanisms through which the states participate in central decision-making, including: the election of members to the second chamber of the central legislature, the Rajya Sabha, by the lower Houses of the state legislatures; the involvement of members of the state legislatures in the election of the President and Vice-President; and an informal practice of appointing cabinet members from all major regions of India.
- There are also some intergovernmental bodies in which representatives of both the centre and the states participate: informal meetings of Ministers and an institution deliberately created for intergovernmental co-ordination: the Inter-state Council
- India has a range of institutions that apply to the activities of both levels of government and that collectively have a centralising effect. These include the Auditor-General, the Election Commission and the Planning Commission.

Systems of government

- The President of India has a largely formal and ceremonial, rather than an executive role.
- India has a parliamentary system, in which the government is formed from the majority in the chamber of the legislature that represents the people, the Lok Sabha.
- India uses a first past the post constituency system for elections to the Lok Sabha.
- India has a multi-party system in which government may change hands following a national election and in which the political orientation of the national and state governments may differ (and often do).
- Fundamental rights are protected in the Constitution. All levels of government are required to respect them.

The legal framework

- The principal rules for the Indian federation are set out in a national Constitution.
- There are no separate State constitutions

- The Constitution is interpreted and enforced by the Supreme Court of India, which is a general court of final appeal.
- The parts of the Constitution dealing with the federal system can be changed by a 2/3 majority in each chamber of the central legislature and ratification by the legislatures of at least 1/2 the states. The Supreme Court has held that federalism is part of the “basic structure” of the Constitution and that there are limits on the amendments that can be made.

IX. Model 2: Less Extensive Decentralisation

This second model offers less extensive decentralization in a form that is also sometimes still described as a federation. It shares many of the features of the first model, with the principal difference that relatively little legislative power is devolved to the other levels of government. Instead, most legislation is made by the centre, but the power to implement much of this legislation, or to make minor rules within a framework of principle, is constitutionally devolved to the other orders of government. Germany is the prototype for a decentralized model of this kind. South Africa is an adaptation of it.

Under this model, legislation is largely uniform throughout the state, making it an attractive option where statutory codes are the primary source of law. The other levels of government have autonomy in administration or execution of the law. In a sense, therefore, this is a quite different approach to the division of power in a decentralized system. Power is divided by function as well as by subject matter, or horizontally as well as vertically.

A model in which one order of government implements the legislation made by another makes even greater demands on co-operation or collaboration between governments. As the German example shows, collaboration can be built into the system by providing for the representation of the governments of the constituent units in a body that must approve legislation that they are to implement. This, in effect, becomes the second chamber in the central legislature: in Germany, this is done by the *Bundesrat*.

Within this broad framework, many variations are possible on matters of important detail. Some of the most common of these are canvassed below:

(i) Which powers should be assigned to the various levels of government?

In this model it is necessary to consider both the subject areas that each level of government should control and the way in which the power to administer central legislation should be divided

- As far as subject areas are concerned, under this model the centre is likely to have most legislative power. Certain subject-areas nevertheless may be left to the sub-national levels of government, on the basis that it is more appropriate that they are exercised at those levels. Culture and education are often powers of the constituent units.
- Equally important, under this model, is the question about how power to administer central legislation should be divided. One possible approach is to provide that, as a rule, all central legislation will be administered by the other levels of government, unless exceptions are stated in the Constitution or, perhaps, made by legislation, following a special process of some kind. Examples of areas in which the centre is likely to retain power to administer its own legislation include defence and foreign affairs.

(ii) Should constituent units be able to impose their own taxes?

Under this model the sub-national orders of government are less likely to have their own tax powers although it would be possible for them to do so. Where they do not have such fiscal powers, the questions asked under Model 1 (about arrangements for revenue redistribution or tax sharing and the equalisation of revenues between the centre and the regions as well as between the regions themselves) become even more pressing.

(iii) Should there be any areas of authority of the constituent units in which the centre can intervene?

As with Model 1, one issue to be decided here is whether the centre should have power to intervene in emergencies or when a constituent unit clearly lacks capacity. In addition, however, there is a further question under this model about whether the centre should have powers to direct the way in which its legislation is to be administered or to intervene if, in its view, legislation is not administered adequately.

In principle, this model assumes that the sub-national levels of government have autonomy in the administration of legislation and are accountable for poor performance to their own people, through the electoral process. Nevertheless, one of the challenges of this model is how to strike an appropriate balance between the efficiency of central decision-making and collaboration between the orders of government over legislation that is made by the centre but administered by the regions. The question is complicated by the reality that there are likely to be different governing majorities in the centre and in at least some of the constituent units. This will add political divisions to the differences in perspective that often exist between levels of government in any event. Concern about deadlocks in the *Bundesrat* in Germany in recent years has led to extensive changes to the structure of the federation, limiting the matters over which the regional governments in the *Bundesrat* have a veto, in return for conferring a wider range of legislative powers on the regions themselves.

(iv) How should courts be organised?

In principle, the same options for the organisation of the courts are available as for model 1. In a relatively less decentralized model of this kind, however, there is likely to be a single system of courts, run either by the centre or by the centre in collaboration with the constituent units.

(v) Are mechanisms necessary to reinforce unity?

In every decentralized system of government there must be a balance between the authority of the sub-national levels of government and the centre. The balance in this model already is tipped towards the centre, through the way in which legislative power is allocated. Involvement of the constituent units in central decision-making is useful from the standpoint of the both local autonomy and unity, because it provides a means whereby the constituent units can share in the exercise of central power.

Case Study Model 2: South Africa

Configuration

- In addition to the central level of government, South Africa has nine provinces.
- The Constitution also recognises the local level of government, describing the three levels as “distinctive, interdependent and interrelated”.

Depth of decentralization

- The South African provinces have both legislative and executive power. However, their legislative powers are very limited, and in practice their function is confined primarily to the execution of central legislation.

- Each province has its own unicameral legislature and executive. There is a single public service and court system.
- The provinces have some minor tax powers but 95% of South African taxation is raised by the centre, which distributes revenue to the provinces and local government.
- The centre has extensive power to intervene in the affairs of the other levels of government.
- The dominance of a single party, the African National Congress, also means that, in practice, the premiers of provinces controlled by the ANC are centrally appointed.

Division of power

- Power is divided between the levels of government in South Africa under two lists. The fourth schedule to the Constitution lists concurrent powers, which are exercisable by both the centre and other levels of government, although if there is a conflict, the central law prevails. The fifth schedule to the Constitution lists powers that are exclusive to the sub-national level of government. These are limited, but include, for example, “provincial planning” and “provincial cultural matters”.
- The exclusive list is less important than it might be, because the central legislature can enact legislation in these areas as well on a range of grounds that include the need to maintain “economic unity”, “essential national standards” and “minimum standards required for the rendering of services” (section 44(2)).

Devices for shared rule

- The central legislature of South Africa is bicameral. The second chamber, the Council of the Provinces, comprises delegations from the legislatures of the provinces. It has specific powers over central legislation that affects the provinces. Veto of a bill by the Council of the Provinces can be overridden by a 2/3 vote of the National Assembly. The NCOP also has authority to monitor proposals for central intervention in provincial affairs and is a mechanism through which provincial concerns can be brought to the attention of central authorities, and vice versa.
- The South African Constitution mandates “co-operative government” and lays down principles for it. It also requires legislation to be passed to establish institutions to facilitate intergovernmental relations. In practice, intergovernmental relations operate in a very top-down way, in part because of the dominance of the ANC and in part because of weak capacity at the sub-national levels of government (Murray 2006).

System of government

- South Africa has an unusual form of parliamentary system, in which the National Assembly elects a President, rather than a Prime Minister, who then resigns from Parliament and acts as both head of state and leader of the government. The President must retain the confidence of the National Assembly to remain in office.
- A system of proportional representation is used for both the central and provincial legislatures.
- South Africa has a bill of rights, which binds all levels of government.

The legal framework

- The framework for decentralized government in South Africa is set out in the national Constitution.
- Provinces may have their own Constitution, which must comply with the quite detailed prescription in the national Constitution. Only one province has its own Constitution.
- The Constitution is interpreted and applied by the courts. The final court of appeal on constitutional matters is the specialist Constitutional Court.
- The provisions of the Constitution dealing with the provinces can be altered by a 2/3 majority in the National Assembly and with the support of six provincial delegations in the National Council of the Provinces.

X. Model 3: A Low Degree of Decentralisation

This model offers the least degree of decentralization, at least in outward form. Under this model, the central state retains final authority but devolves or delegates it to sub-national units. The powers delegated may be legislative, administrative or both.

Authority to establish regions and to delegate power derives from the national constitution. The national constitution may also provide a framework of rules for decentralized government, so as to protect regional autonomy to a degree, but it will not necessarily do so. Under this model there is likely to be greater central control of the structure of the sub-national institutions of government. The centre also retains final legal control over the exercise of delegated power, so that if anything goes wrong, it has the authority to intervene. The sub-national orders of government are accountable for their performance to the centre, as well as to the people. The Republic of Macedonia (or, as it is sometimes called, the Former Yugoslav Republic of Macedonia) is an example of a decentralized model of this kind.

As with the other two models, many variations are possible. Key questions to be asked in settling the final design are similar to those for Models 1 and 2. Again, however, the answers are affected by the difference in the legal relationship between the centre and the other levels of government:

(i) What powers should be assigned to the constituent units?

Two sets of issues require decision here:

- The first concerns the functions that should be conferred on the constituent units. In a model of this kind, sub-national levels of government are likely to carry out administrative functions on behalf of the central government. They may well have delegated legislative power as well, within limits laid down by the central legislature.
- The second concerns the subject areas that should be allocated to the constituent units. As in relation to the other models, the answer to this question depends on identifying areas that can effectively be dealt with by a sub-national government. But particular local considerations may also be relevant. For example, a history of conflict may suggest either that policing should be a local responsibility or that it should be a national responsibility, depending on the experiences and apprehensions of the people.

(ii) What arrangements should be made for financing the sub-national orders of government?

Sub-national governments may have some powers of taxation under this model, but they are likely to be dependent on the centre for much of their revenues. Attention therefore needs to be paid to the bases for revenue redistribution from the centre and its allocation between the recipient governments, in accordance with procedures that are transparent, predictable and fair.

(iii) Should there be areas in which the centre can intervene in the affairs of the constituent units?

This model assumes that the powers of the constituent units are delegated to them by the centre. In such a case, it is relatively easy for the centre to intervene if it wishes to do so. It may be desirable to identify mechanisms to restrict unnecessary intervention and to secure accountability for it.

(iv) How can the balance between self-rule and shared rule be protected?

- In Models 1 and 2, some attention was paid to the way in which the unity of the state could be reinforced, to balance a significant degree of decentralization. Under this model, the concern is the opposite. The authority of the centre is greater and mechanisms may be needed to protect

the autonomy of the regions from erosion. Part of the solution may lie in the internal dynamics of the state: for example, decentralization may be protected by the potential for a renewed outbreak of violence or threat of secession.

- Where there are no political factors of this kind to underpin decentralization, consideration should also be given to providing a measure of protection for the autonomy of the sub-national levels of government in the national constitution itself.

Case Study Model 3: Republic of Macedonia

Configuration

- Macedonia has a central level of government and 85 municipalities
- Municipalities can be further sub-divided into neighbourhoods

Depth of decentralization

- The Constitution guarantees the right to local self-government and gives municipalities autonomy in the exercise of their powers
- Municipalities have both legislative and executive powers, including some tax-raising powers.
- Powers are delegated to the municipalities by legislation, however, which must be passed by a 2/3 majority vote in the legislature.
- Municipalities consist of a mayor and a municipal council.
- Municipalities are subject to the supervision of central authorities, to ensure that they do not exceed their powers.

Actual distribution of power

- Powers assigned to the municipalities include: urban and rural planning, protection of the environment, local economic development planning, regulation and organization of public local transportation; supply of natural gas and other forms of energy for heating, culture, sport and recreation, social welfare and child education.

Devices for shared rule

- Some decision-making requires the approval of national minorities. In particular, certain laws, including those regulating local self-government, must be adopted by a 2/3 vote in the central legislature, which includes a majority of the votes of representatives who belong to the communities not in the majority amongst the population of Macedonia. Some members of the Constitutional Court must also be chosen by a vote in the legislature which includes a majority from communities not in the majority population.

The rest of the system of government

- Macedonia has a parliamentary system of government, with a President who has largely ceremonial functions
- A system of proportional representation is used for parliamentary elections.
- The constitution guarantees rights at all levels of government

The legal framework

- The constitution guarantees the right to local self-government, but does not otherwise provide a framework for it. Instead, the framework for decentralization is provided by national legislation, enacted by a 2/3 majority in the Parliament.
- A Constitutional Court resolves questions about the respective competencies of the centre and local self-government.

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