



Constitution Brief

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The MyConstitution project works towards a home-grown and well-informed constitutional culture as an integral part of democratic transition and sustainable peace in Myanmar. Based on demand by Myanmar stakeholders, expert advisory services are provided to those involved in constitution-building efforts. This series of Constitution Briefs is produced as part of this effort.

The MyConstitution project also provides opportunities for learning and dialogue on relevant constitutional issues based on the history of Myanmar and comparative experience.

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The Division of Powers in Federations

Cheryl Saunders

1. Introduction

A federation consists of at least two levels of government, each of which has a degree of autonomy that is protected by a constitution. Countries with a federal system of government share powers between these levels in different ways, which affects their decision-making processes (Leroy and Saunders 2006). This brief was written initially for use in Myanmar. It therefore refers to the central level of government as the union and to the sub-national level as comprising states and regions.

The primary focus of this brief is the division of legislative power, which typically raises the most difficult questions. In designing a federation, however, it also is necessary to consider the allocation of executive and judicial power between the levels of government. The division of executive power is discussed briefly below. The different approaches to the organization of judicial power in federations is the subject of a separate brief and will not be dealt with further here (Saunders 2019).

The brief begins by outlining the foundational features of a federal system, as necessary background information for understanding the significance of the division of powers. Section 3 identifies the principles that can be used to decide which legislative powers are allocated to which level of government. Section 4 considers the techniques commonly used in putting the division of legislative powers into constitutional form. Section 5 covers the division of executive power, Section 6 deals with the division of tax powers and Section 7 draws attention to the fact that, in a federation, the levels of government often work together in the interests of the country as a whole. The final section considers the challenges of transition and implementation.

2. Foundations

Federalism provides for unity in some matters and localized self-government in others. The reasons for structuring a state as a federation vary. Often, a federation is established to assist to maintain peace or to manage diversity. More generally, federalism also can deepen democracy, by providing a level of government that can respond more effectively to local circumstances. States and regions also can help to inform union institutions about conditions, needs and demands around the country.

The division of legislative power is at the heart of this arrangement. In every federation, the constitution divides legislative power between the

levels of government. Each government is democratically accountable to its own constituents for the way in which its powers are exercised. These are not delegated powers: one level of government does not need to rely on the other level to approve the exercise of its own powers, unless the constitution specifies otherwise. Similarly, each level of government is responsible to its own constituents for the exercise of the executive power that is conferred upon it.

Federal constitutions, including the division of powers, are enforceable through courts. When this occurs, the court must interpret the constitution and decide how it applies; such decisions are typically binding. For this reason, the possible effects of judicial interpretation should be borne in mind when designing and drafting the division of powers (Aroney and Kincaid 2017).

3. Principles for the allocation of legislative powers

The particular powers that a constitution assigns to each level of government in a federation vary. The choice depends, for example, on the local context, local preferences, the overall design of the federation and the purpose of structuring the state as a federation. For example, in Australia, general criminal law is a state power, while in Canada and Malaysia it lies with the union. In the United States, marriage and divorce are state powers, while in Australia these are union-level matters. In Germany, most legislative powers lie with the union, but the federation is organized in a way that enables the states and regions to exercise union power during the legislative process. In Germany, the states also have the constitutional right to administer most federal legislation. In Canada, the regions have power over ‘civil law’, which enables Quebec to retain its civil law legal system in what otherwise is a common law country.

The principle of *subsidiarity* offers a general guide for the division of legislative power in a federation (Fabbrini 2016). According to this principle, powers should be assigned to the lowest level of government at which they can effectively be exercised so that the process of governing takes place as closely as possible to the people affected by it, in the interest of responsive and effective decision-making. Responsive and effective decisions, in turn, foster democracy and attract public engagement and support.

In practice, however, there is room for disagreement about how the principle of subsidiarity applies in particular cases. Other, more specific, guiding principles can be useful as well.

Considerations that typically guide the allocation of powers to the union level include whether a power:

- relates to the exercise of the country’s external sovereignty (for example, international relations, defence, foreign investment, international trade);
- spills over state and region borders and cannot effectively be handled by states and regions acting individually (for example, trade between states and regions, interstate river systems, aviation); and
- requires uniform regulation across the country (for example, currency or corporations law).

Considerations that typically guide the allocation of powers to the state and region level include whether a power:

- can be handled within the borders of a state or region (for example, school education, local roads, abattoirs);

- deals with matters of local concern (e.g. culture, local infrastructure); and
- involves matters on which diversity, innovation, or constructive competition between states and regions would be useful (e.g. waste reduction, tourism).

In applying these considerations, two points should be borne in mind. First, such guidelines do not determine whether a power should be exclusive or concurrent (i.e. exercisable by both levels of government). For example, a general power over the ‘environment’ could be conferred on either level of government, in accordance with the above principles, and so usually would be a concurrent power.

Second, governments in a federation often co-operate with each other in the exercise of their powers. The possibility of cooperation is a factor that may be taken into account in allocating legislative powers. For example, in Australia, the provision and management of hospitals is a state and region power, but medical insurance is a union power. In both cases, the allocation of power is consistent with the principles outlined earlier, but some collaboration between the two levels of government has been necessary in practice for the effective exercise of both powers. Section 7 discusses this issue in more detail.

4. Techniques for the division of legislative powers

Various techniques are used to codify the division of powers in the constitution. For instance, powers may be identified as exclusive (available only to one level of government), concurrent (able to be exercised by either level of government) or residual (not specifically listed in the constitution). Other variations include whether the powers of both levels of government are enumerated; the detail used to enumerate powers; how conflict is resolved between the laws of the levels of government; and the potential for flexibility in the division of powers. The rest of the section explores the decisions to be made in this regard.

Should the powers of both levels of government be enumerated, or only one level?

Many constitutions list, or enumerate, the powers of both levels of government: Canada and India are examples. Some constitutions, including those of Germany and the USA, enumerate the powers of only one level of government; usually, the union. In these cases, all powers not specifically given to one level of government are allocated to the other level, as residual powers.

How much detail should be used to describe each power?

There are considerable differences in the degree of detail federal countries use to describe the division of legislative power. Article 1, section 8 of the US Constitution briefly lists the union’s enumerated powers, while the Seventh Schedule of the Constitution of India lists the powers of both levels of government in considerable detail. The level of detail of enumerated powers of the union in Germany falls somewhere in between (articles 72–74). In general, a less detailed list of powers may be incorporated into the body of a constitution (Germany, USA), whereas more detailed lists are generally added at the end, for instance in a schedule (India).

Should powers be described as exclusive, concurrent or both?

Each power allocated either to the union or to the states and regions may be described as exclusive or concurrent. *Exclusive* powers can only

be exercised by the level of government to which they are allocated, as Canadian experience shows (Brouillet and Ryder 2017: 420), while concurrent powers can be exercised by either level of government (Dziedzic and Saunders 2017). The former are relatively inflexible, but guarantee a minimum core of powers to each level of government. The latter are flexible, in the sense that the union can leave them to the states and regions by refraining from exercising the powers itself. Once the union exercises *concurrent* powers, however, the core available to the states and regions shrinks. These differences are also likely to affect a court's interpretation and application of the division of powers. Where the powers of both levels of government are enumerated and both exclusive and concurrent powers are used, it is common to have three lists of powers; India is an example.

How should conflict between the exercise of powers be resolved?

If a power is concurrent, in the sense that it (or parts of it) can be exercised by either level of government, there is obvious potential for the power to be exercised in a way that leads to 'inconsistency' or 'repugnancy' between laws. It is therefore necessary to provide a rule to avoid or resolve such inconsistencies or conflicts. Usually, such rules allow the union law to prevail, as in section 109 of the Australian Constitution. Under article 72(3) of the German constitution, however, state or region prevails in certain areas. India's repugnancy rule enables the state or region law to prevail within the state if it was reserved for the assent of the president, subject to provision to the contrary by the union parliament (article 254(2)). Comparative experience shows that there can be conflicts between the operation or effect of the laws of two levels of government even where powers are exclusive. To resolve this problem, union law is usually considered paramount (Brouillet and Ryder 2017).

Which level of government should have residual power?

However detailed the division of legislative power may be, there are always powers for which no provision is made, even if the enumerated powers are interpreted broadly. It is therefore always necessary to decide the level of government to which residual power is allocated. Practice varies considerably. In some federations residual power is given to the states and regions, as in Australia, Malaysia and the USA. In other federations, residual power is given to the union, as in Canada and India. The allocation of residual power is likely to be less significant in practice where each level of government has enumerated powers, whether they are exclusive or concurrent.

Can there be flexibility in the allocation of power between levels of government?

The division of legislative power between the levels of government needs to be stable, so that governments can plan and develop expertise in their areas of responsibility. Some flexibility is also useful, however, to respond to changing circumstances over time. Some of the techniques described above are helpful for this purpose. Most obviously, specifying powers as exclusive rather than concurrent enables either level of government to use them, subject to the inconsistency rules. Even when powers are exclusive, however, some federations have developed ways of building a degree of flexibility into how the division of powers operates in practice. For instance, in Germany, the union can authorize the states and regions to legislate in an area of union exclusive power (article 71). Conversely, in India, the legislatures of two or more states and regions can 'consent' to the exercise of their exclusive state powers by the union legislature (article 252). Malaysia has a similar mechanism (article 76(1)(c)). In Australia, one

or more states and regions can ‘refer’ a ‘matter’ to the union if it seems unlikely that it already falls within union enumerated powers (section 51 (xxxvii)).

5. Division of executive power

The scope of executive power varies between constitutional systems. At a minimum, it always involves the power to ‘execute’ legislation. Executive power is always allocated between the levels of government in a federation, by the constitution, expressly or by implication. There are two general approaches to allocating such powers.

In Australia, Canada and the USA, each level of government has executive power to enact its own legislation, for which it needs public service agencies. In general, the public service of each level of government is accountable to the government and legislature of that level and its constituents.

In the second approach, in other federations, states and regions administer some union legislation as well as their own. In Germany, for example, states and regions administer a great deal of union legislation in their own right, as an aspect of the federal division of powers (article 83). In an important variation in India, one level of government may (but need not) confer on the other the authority to administer its legislation (articles 258, 258A). Similarly, in Malaysia, the union can authorize states and regions to administer particular union laws (article 80(4)). This approach to the division of executive power has the potential advantage of bringing administration closer to the people. It also requires considerable trust between the levels of government.

Four additional matters need to be decided when adopting this approach. The first is how much flexibility states and regions have to adapt union legislation to local conditions. The second is whether (and in what circumstances) the union can intervene if it considers that a state or region is not properly fulfilling its responsibilities. The third matter concerns funding, while the fourth is the impact on the structure of the public service. In Germany, for example, areas where union legislation is administered by the states and regions do not require a large union public service.

6. Taxation powers

The power to impose taxes can be treated in the same way as any other legislative power: it may be assigned to either or both levels of government, using the various drafting techniques identified above. Similarly, depending on the division of executive power, taxes can be collected by either level of government. The power to impose taxes is distinctive in two main ways, however.

First, taxation can be subdivided into different categories, some of which are more suitable to be dealt with at the union or states and regions level. For example, the imposition of customs duties is typically a union power and property taxation is generally a state or region power. It is therefore necessary to decide whether to allocate taxation as a general power or whether to identify different categories of taxation and allocate them to different levels of government. In the latter case, it must be determined whether particular tax powers should be concurrent or exclusive, and how any inconsistencies should be resolved.

Second, taxation is a source of revenue on which the exercise of all other legislative powers depends. If the division of tax powers leaves the states and regions with insufficient funds to exercise their own powers, which is usually the case, the redistribution of revenue from the union to the states

and regions will be necessary. There is almost always an associated question of how revenue is allocated between the states and regions to achieve a measure of equalization. Revenue redistribution is an important subject in its own right, which is beyond the scope of this brief, but its links to the distribution of tax powers should be noted (Shah 2007).

7. Working together

Power is divided between levels of government in a federation to secure the advantages of unity for some purposes and diversity and local responsiveness for others. For this to work, each level of government needs to take responsibility for the exercise of its own powers in ways that are accountable to its constituents.

Both levels of government will often need to work together for the common good, for example by exchanging information, or jointly funding or coordinating programs. Some federations provide formal mechanisms to carry out joint actions. Chapter 3 of South Africa's constitution, for instance, deals specifically with 'cooperative government'. Other federations use informal processes, or a combination of the two, such as regular meetings of ministers with similar responsibilities in different levels of government and agreements to share information or to coordinate programmes. Cooperation should be sufficiently transparent and designed to preserve the benefits of multi-level government by avoiding the risk of concentrating too much power in the executive branch (Poirier, Saunders and Kincaid: 2015).

8. Transition and implementation

All constitutional changes require a transition phase as the country moves from one set of arrangements to another, and a process of implementation to ensure the new arrangements are put in place and working properly. Both stages require careful attention to dividing power for federal purposes.

Transition. When powers are divided in a country that has previously operated in a more centralized manner, it will be necessary to think about when (and how) legislative and executive powers are transferred from the union to the states and regions. This transfer may depend in part on the capacity of the states and regions to exercise enhanced powers. If capacity building is needed, it may be useful to establish a time limit within which that must occur and to put in place a process to transfer powers from the union to the states and regions on request. Such transfers of power are likely to require a transfer of public service departments as well, with new lines of accountability to state and region, rather than union, institutions.

Implementation. Implementing new arrangements for the division of powers requires practical steps to be taken as the union surrenders power, and states and regions put in place arrangements for its exercise. This may require, for example, new procedures in the legislative and executive branches of government and some restructuring of the public service. Implementation also requires changes in assumptions and practices on the part of both the union and the states and regions. The union needs to accept that certain matters are no longer its responsibility. Likewise, the institutions of the states and regions need to assume the new responsibilities and exercise them effectively. Courts and tribunals with the jurisdiction to interpret and apply the constitution need to understand the new division of powers and to adjust any interpretive practices or doctrines that are no longer appropriate. The people themselves also need to understand and support the new division of powers, as it affects their lives.

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