No 64

Politorbis

In Support of

Federalism Debates

1/2017

Politorbis

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FOREWORD

A Swiss contribution to strengthening good offices and expertise in support of federalism debates

The world has become less stable and more unpredictable. Wars are raging, crises have become more acute even on Europe's eastern fringes and migration flows present major challenges. All of these crises have their own specific causes and characteristics based on global politics and internal demands for better prospects for all communities. These challenges to peace and security have in common the need to reconcile diversity within and beyond national borders.

Addressing the challenges posed by diversity must start within countries and it particularly difficult for those recovering from a conflict or an autocratic regime. Federalism is one of the options worth considering by national stakeholders in order to overcome divisions, resolve past conflicts and prevent new ones. Federalism has proven effective in contributing to prevent and resolve conflicts in various culturally-diverse countries undergoing transition. It can help preserve a state identity that encompasses several constitutive groups and accommodate several power-centres to ensure better access to decision-making, resources and services for different ethnic, cultural, linguistic, religious or regional groups. This can contribute to a more democratic society and, in turn, prevent conflict. Depending on the context and how it is designed and implemented, federalism can, however, also present risks to the overall system of governance and peace process. New imbalances of power, deeper divisions, the "ethnicisation" of politics and greater corruption at sub-national level are all potential risk. Ultimately, federalism will only work if there is a consensus in favour of living together in the respective societies.

Inclusive and transparent debates among political representatives, institutions, civil society and citizens are therefore essential for any country considering the introduction of federalism. Whether the debate is part of a formal constitutional and democratic process or an informal dialogue, the process itself is key to building a common vision and consensus around new power-sharing arrangements. Debates can help explore institutional options to balance interests within state institutions and help prevent and transform violent conflict and political crisis in post-conflict transitions and nascent democracies. They can help clarify what federalism is, what options it offers and what the alternatives are. Debates can help identify the interests behind stakeholders' positions and also foster the search for win-win solutions and compromises. They also help liaise with various interest groups. In transition contexts, federalism debates can be an integral part of peacebuilding, democracy promotion and peacebuilding efforts. Indeed, they can help settle disagreements through political means and dialogue.

As a stable federal state with multiple linguistic and cultural communities, as well a long democratic tradition, Switzerland is often requested to provide recipes to integrate diversity within state institutions and to ensure a fair distribution of power and resources at various levels of the state. Whenever Switzerland presents its experience of federalism, it is particularly careful not to promote the reproduction of the Swiss system in other contexts. In response to requests for support from countries undergoing reform, Switzerland has frequently offered its good offices and shared technical expertise, with a particular focus on organising, stimulating and nourishing existing national debates. This is why Switzerland is still regarded as a trustworthy and credible partner that brings experience and knowledge to the table without pursuing its own hidden agenda.

The present publication is the result of a mandate given to two independent Swiss experts and was written in consultation with a wide range of practitioners. It is a further Swiss contribution to strengthening good offices and expertise in support of federalism debates and aims in particular to inform national, international and Swiss mediators, advisers, practitioners and stakeholders who support democratic reforms and peacebuilding processes. It covers the design of processes in a way that mitigates risks of polarisation and violent confrontation and that allows national stakeholders to reflect and reach informed decisions on a range of options for state organisation.

It also provides an illustration of lessons learned in various contexts. It should be noted that the views expressed in it are solely those of the authors and not in any way those of the Swiss government.

I am confident that the present publication and its recommendations will contribute to fruitful debates and inspire current efforts for peace, democracy and stability worldwide.

I wish you an insightful and rewarding reading.

Heidi Grau,
Ambassador
Federal Department of Foreign Affairs
Human Security Division

INTRODUCTION: **IN SUPPORT OF FEDERALISM DEBATES**

In several countries, debates on the introduction of federalism take place. This publication focuses on key challenges in federalism debates that are related to context, process and substance. The publication targets external supporters to such debates, such as experts in peacebuilding, mediators/facilitators of dialogue, or technical experts as well as involved stakeholders. The publication will draw external supporters' attention to certain key considerations for when they consider supporting or indeed support federalism debates.

The term 'federalism debate' is here used for any kind of discussions or negotiations related to federalism within a political process, whether this process is characterized as peace negotiations, national dialogue, constitution-making, or any kind of transition process from one governance system to another. Federalism can be defined as "constitutionally guaranteed self-rule and shared rule". Countries have incorporated federal elements to different extents. A country is called a federation when the following six characteristics deriving from the definition of federalism are present: (1) There are at least two levels of government, the federal level (center) and the level of federal units. Each level of government has its own substantive decision-making powers, for which they interact directly with their citizens; (2) The major elements, including the distribution of legislative and executive powers and the allocation of revenue resources between the levels of government are included in the constitution; (3) The federal units are involved in the decision-making at the federal level, normally through the representation in a second chamber of parliament; (4) The constitution is not unilaterally amendable by the center and requires for amendment the consent of a significant proportion of the federal units; (5) There are dispute resolution mechanisms available for the case of disputes over the constitutional powers of the levels of government; and (6) There are processes and institutions of intergovernmental relations between the center and the federal units.

The title of this publication "In Support of Federalism Debates" provokes three questions: Why focus on federalism? Why focus on federalism debates? Why focus on support to federalism debates?

Why focus on federalism? About one-fourth of countries are organized as federations and several others are considering introducing federalism. Debates on the introduction of federalism often take place as a last resort in order to prevent or manage conflict, in fragile and contested contexts, but also as part of reforms in transition to democracy. Federalism can establish a state organization that allows acknowledging and accommodating for instance ethnic, cultural, linguistic, religious or regional diversity. It can also promote the existence of several power-centers and provide tailored resource sharing between such power centers – within one state. Federalism allows for creating and maintaining a state identity that can encompass several constituting groups. Federalism can contribute to enhancing democracy by instituting elections and democratic decision-making at regional and central level, leading to different elite combinations, and by enhancing the integration of different interests in decision-making. A successful consolidation of democracy can be evaluated by the success in broadening the original elite bargain and evolving rules for peaceful transfer of power from one government, representing one combination of elites, to the next. Federalism can be the basis for diversity in unity thanks to its combination of self-rule, which allows for some separate democratic decision-making and diversity as well as of shared rule which allows for some common democratic decision-making and unity. The anchoring of the two principles of self-rule and shared rule in the constitution provides for stability by preventing one-sided change. It also supports a sense of equality and non-sub-ordination between the center and the federal units.

There is however also evidence that depending on the context, the political dynamics and the federal

design, the introduction of federalism can produce new imbalances of power, create new minorities at the regional level, contribute to the ethnicization of politics, to a deepening of divisions, or spread of corruption to the sub-national level. In addition, there may be questions of capacity and costs. Federalism alone cannot rebuild the eroded trust between different stakeholder groups. The impact on the overall governance system and benefice to peace- and state-building therefore much depends on the federal design and its implementation.

Why focus on federalism debates? The introduction of any kind of federal system has to be debated in order to be legitimate. The term 'federalism debate' is here used for any kind of discussions or negotiations related to federalism within a *formal, disciplined, and rule-governed political process*[1]. Federalism as a topic can come up in different sort of debates: peace negotiations, national dialogue and constitution-making as well as general reform processes. Indeed, peace negotiations - more often than not - do not only focus on the cessation of hostilities and ceasefires. Rather, they include reflections on the future state, as do national dialogues. Furthermore, as becomes clear from the definition of federalism, as federalism has to be anchored in the constitution, any introduction of a federal system will have to include a constitutional process, and any federal reform will have to include at least a constitutional amendment debate. It is particularly likely that federalism will come up in such debates when a preceding violent or non-violent conflict or strong dissatisfaction is related to the status of different groups within the state, the political power of distinct groups within a certain area of the state, their respective access to resources, or perceived imbalances between the center and the periphery. Debates on federalism will have to be embedded in larger peace-, state-building democratization processes. Conducting debates on state organization, including federalism, can contribute to building a vision for the state without conflict and with a vibrant democracy, federalism debates however tend to have to overcome difficult dynamics. Federalism impacts on the power balance. Debates on power, in what way, to what extent, and when it shall be shifted are often contentious. Stakeholders will have a variety of visions and interests that

may clash. Depending on debate dynamics, debates can do harm, entrench divisions, lead to polarization or even renewed conflict. Furthermore, conducting debates on state organization, including federalism, can contribute to a vision for the state without conflict and with a vibrant democracy.

Why focus on support to federalism debates? As mentioned above, debates on federalism may be part of peace negotiations, national dialogue processes, constitution-making processes or general reform processes. Such processes are oftentimes supported by external partners through good offices with peace-, state-building and democratization objectives in the hope that debates contribute to building a peaceful and democratic vision for the future. The above pointed out challenges however show one thing clearly: The conduct of federalism debates and the support thereto cannot be taken lightly.

According to Article 21 (3) of the Universal Declaration of Human Rights, 'the will of the people shall be the basis of the authority of government'. This is to say that international law does not prescribe a specific system, but calls for the people to participate in governance. Decision on the state structure, including on the introduction of federalism is therefore up to the people, and external supporters have to show restraint and respect for national debates. In certain cases, there are good reasons for opting for federalism, in many other cases there are a multitude of reasons to choose a different system. External supporters can however support a country and all its stakeholders in the process of reflecting on a common vision and potential organizational options, including federalism. Context and process dynamics require careful navigation, by national stakeholders, but of course also by external supporters whose actions, or indeed mere perceptions of their intentions, may affect the debates– positively and negatively. Therefore, the various visions and interests of respective stakeholders, their relations, the way different federal options are discussed as well as how federal options can impact on the future power balance, and how external engagement influence on each of these, among others, need to be carefully analyzed and taken into consideration when engaging. In particular, external supporters can assist stakeholders in designing the process of debates in a way that mitigates risks of polarization and confrontation and that allows for informed decision-making on the

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1   See for the term debate, e.g. The Oxford English Dictionary, 2010, 3rd Edition, Edited by J. Simpson and E. Weiner. Clarendon Press.

variety of options for state structure. In this spirit, this publication does not promote federalism or any variety thereof.

The publication, targeting stakeholders and supporters of federalism debates, aims at deepening the understanding of terms and concepts - federalism and its alternatives -, as well as of the key challenges in a federalism debate and their dynamics. It discusses process and substance issues that require particular attention. Furthermore, it provides some reflections on the implementation of a federal design. Aiming at external supporters, the publication also includes lessons from practice in supporting federalism debates. It has the following parts:

- A **first part** provides definitions of federalism and outlines the origins, rationales and determinants of federalism. It also lists some opportunities and risks and introduces alternatives to federalism. This part shall provide the reader with an initial orientation on federations; presenting federalism as only one of the many alternatives for state organization.
- A **second part** is dedicated to context and process. It focuses on peace-, state-building and democratization processes, since most recent federalism debates took place in such contexts. In addition, it looks at the main venues for federalism debates, including peace negotiations, national dialogue processes and constitution-making processes. It shows their specificities, how these processes interrelate, how the design choices impact on the federalism debate, and identifies main process issues to consider.
- A **third part** reflects on major questions of federal design, outlining options based on comparative experiences. Furthermore, it includes a chapter on factors that can negatively impact the functioning of federations. This part does not aim at providing a comprehensive overview of all substance issues related to federalism which can be found in excellent existing publications. Rather, the publication aims at selecting those main issues that tend to be discussed during federalism debates, establishing why certain issues tend to be controversial or challenging, and identifying approaches that might help to overcome controversy.
- Finally, as **conclusion** some considerations from the perspective of implementing federalism are provided, pointing to the importance of consider
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ing implementation related aspects already early during the debates.

Part 1 was primarily prepared by Andrea Iff, Part 2 jointly by Andrea Iff and Nicole Töpperwien, Part 3 as well as the conclusions primarily by Nicole Töpperwien, with the exception on the chapter on public finance and natural resources for which Andrea Iff took the lead.

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2   Iff, Andrea and Nicole Töpperwien, 2008, Power Sharing. Lessons Learned from the Swiss Experience, Federal Department of Foreign Affairs, Switzerland, Politorbis 2.

PART 1: **FEDERALISM AND ITS ALTERNATIVES**

A short introduction to federalism. In many situations where federalism debates are supported, they take place even though there is limited knowledge on what federalism actually means and sometimes different stakeholders have different understandings and perceptions of federalism. When conducting debates on federalism, the clarification of concepts, ideas and meanings is often the first step to create a common understanding and basis for the discussions. Discussions on definitions and concepts can also help provide awareness of the countless varieties of federal systems. This part aims at

- clarifying what federalism is by providing definitions and some insights into the variety of federal designs and related terminology (Chapter 1: What is federalism, what are federations?),
- as well as at identifying the "origins, rationales and some opportunities and risks of federalism" (Chapter 2: What are origins, rationales and determinants of federal systems?).
- It also outlines some of the main alternatives to federal state organization as well as approaches of group accommodation that can complement federalism (Chapter 3: What are alternatives to federalism?).

CHAPTER 1: **WHAT IS FEDERALISM, WHAT ARE FEDERATIONS?**

Multiplicity of federal designs. Today, 26 countries in the world are considered as federal and include such diverse states as Switzerland, Russia, Ethiopia or Brazil (see Table 1). Together, approximately 40 percent of the world population live in federal systems. Federal countries are diverse in their political organization. One can almost say that there are as many different federal systems as there are federations. Nevertheless, all federations have some common features.

Table 1: Federations

Formed pre-20th century	Formed 20th century	Federal constitution (not fully consolidated/ implemented)
United States (1789)	Austria (1920)	Iraq (2005)
Mexico (1824)	Germany (1948)	Nepal (2015)
Venezuela (1830)	India (1950)	
Switzerland (1848)	Malaysia (1963)	
Argentina (1853)	Nigeria (1963)	
Canada (1867)	United Arab Emirates (1971)	
Germany (1871)	Pakistan (1973)	
Brazil (1889)	Spain (1978)	
Australia (1901)	Micronesia (1979)	
	St. Kitts and Nevis (1983)	
	Russia (1993)	
	Belgium (1993)	
	Ethiopia (1995)	
	Bosnia & Herzegovina (1995)	
	Comoros (1996)	
	South Africa (1997)	

Source: based on Hueglin[3] and Anderson[4] as well as own updates

Federalism: constitutionally guaranteed self-rule and shared rule. Table 1 shows the diversity of countries that characterize as federations (based on an assessment of their constitutions). The question is, as there is such diversity among federal systems, what is federalism and when is a country qualified as a federation? In a short formula, federalism can be defined *as constitutionally guaranteed self-rule and shared rule* or as the Glossary of Federalism Terms puts it: "Federalism refers to a broad category of political systems in which, by contrast with the

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3   Huguelin, Thomas O., and Alan Fenna, 2015: *Comparative federalism: A systematic inquiry.* 2nd ed. Ontario: University of Toronto Press
4   Anderson, George, 2008: *Federalism: An Introduction.*, Ontario: Oxford University Press, p. 2.

single central source of political and legal authority in unitary systems, there are two or more constitutionally established orders of government, each directly elected, and each order having some autonomy from the other in terms of the powers assigned to it. The system combines elements of shared rule (collaborative partnership) through a common government and regional self-rule (constituent unit autonomy) for the governments of the constituent units"[5].

Federation. Countries have incorporated federal elements to different extents. A country is qualified as a federation when the following six characteristics deriving from the definition of federalism are present[6]: (see also graph 1):

1) There are at least *two levels of government*, a federal level and a level of federal units. Each level of government has its own substantive decision-making areas, where they can interact directly with their citizens (self-rule);
2) The design and major principles of the institutional organization (powers and resources) are guaranteed in the constitution. For example, this includes the distribution of legislative and executive authority and the allocation of revenue resources between the levels of government;
3) The *federal units are involved in the decision-making at the federal level* (shared-rule). There are provisions for the representation of the federal units in the central policy-making institutions. For example, regional representatives come together in a legislative second chamber;
   4) The *constitution is not unilaterally amendable* and requires the consent of a significant proportion of the federal units for amendment. This can be guaranteed by consent of the legislatures of the federal units or by regional majorities in a popular referendum;
5) In the case of disputes over the constitutional powers of the levels of government, there is an umpire (a dispute resolution mechanism), usually in the form of courts (or by provision for referendums like in Switzerland) that decides;
6) Processes and institutions of *intergovernmental collaboration* are established in those areas where

governmental powers are shared between the different levels or among the different levels of government.

Figure 1: Six elements present in federations
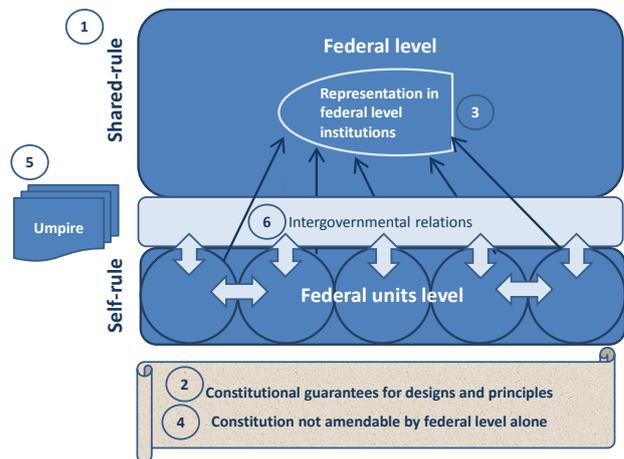
Source: Andrea Iff based on Watts[7]

Variations of federal systems. Even though each federation is characterized through those six elements, federal countries show a rich diversity of how they have implemented those six elements. In the following, some characteristic differences in federal political systems will be discussed that lead to such variations: How does the federation come into existence? How many tiers of government are there? On what basis are sub-units formed? Do all sub-units have the same powers and responsibilities? How are sub-units represented in the federal institutions? These differences are mentioned here because for some of the resulting variations specific terminology is used: e.g. federalism by aggregation, personal federalism, cooperative federalism, integrated federalism, dual federalism. In debates on federalism some of these terms will come up. The following discussion shall help to find some orientation what is meant by these terms.

Formation by aggregation and by de-aggregation. In federations by aggregation (*sometimes called coming-together federations*) more or less sovereign states create joint federal (central) institutions and attribute some of their decision-powers and sovereignty to the newly established federal level of government. Most older federations, like for instance Switzer-

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5   English-Nepali Glossary of Federalism Terms, International IDEA & Forum of Federations, 2009.

6   Watts, Ronald, 2001: "Models of federal power sharing". International Social Science Journal, 53: p. 23–32

7   Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed. Montreal: McGill-Queen's University Press

land, are examples of federations created by aggregation. In 1291, the old Swiss confederation had been formed as an alliance of a few cantons in the central Alps and then subsequently over the years, more cantons had joined this initial confederation. In 1848, the Confederation transformed into a federation[8]. Other federations, in particular newer federations, are formed by a process of d*e-aggregation*, introducing federalism in a formerly unitary state. Such federations are sometimes called *holding-together federations*. The term holding-together already suggests that in many of these federations, federalism was introduced in order to hold the different parts of the country or different communities together. All countries that introduced federalism in the last 20 years did so in response to or to prevent violent conflict, as part of peace- and statebuilding and/or democratization processes. Also ongoing debates in Myanmar, Yemen, Somalia or South Sudan fall in this category. In some cases, it is not possible to clearly determine whether the formation of the federation was based on a process of aggregation or of de-aggregation, for example in many cases in which federalism was introduced in the context of colonialization, either still by the colonizers or during the independence process. Finally, some scholars also distinguish *putting-together federal systems*, where sub-units are forced together in a coercive act by a non-democratic center.

Two-tiered and three-tiered federations. There are always at least two levels of government in a federal system. *But, can there be more than two tiers?* Most federations do not only have two but three levels of government: federal/central, state/provincial and local government. In some federations, local government is also constitutionally recognized (for example in India and South Africa) and in others, it is merely a competence of the state/provincial government (for example in Canada or Australia). However, how 'strong' local governments finally are, also depends on the nature of the constitutional recognition, as well as on the political culture. In Switzerland for example, constitutional recognition for local governments was only introduced in the constitutional reform of 1999, however, the Swiss political tradition ensured that the local governments were recognized and treated as significant partners within the federation since its beginning. In most federations, there is a wide array of local government institutions. A distinction of increasing importance is the one of *rural and large urban local governments* (metropolitan areas). One of the issues that emerge with strong metropolitan municipalities is the competition with the provincial level for resources and power. Furthermore, several federations provide a special status to the capital city.

Personal, culturally-based and territorial federalism. Most federations are composed of territorial units, some however give rights of self-rule and shared rule directly to communities. In such cases, the term *personal (or corporate)* federalism is used. For instance, in the Ottoman Empire some issues were left to the religious communities. Fiji recognises the right of indigenous people to their own administration. Belgium applies a mixed approach and is divided into regions and communities (though also communities have to some extent a territorial basis). In Ethiopia, territorial sub-units as well as peoples, nations and nationalities are represented in the upper house of Parliament. If federalism is organized along territorial entities – the classic form of federal state organization – boundaries can either be drawn so as to create – to the extent possible – territorial entities with ethnically, culturally, religiously or linguistically homogeneous populations (this is normally called culturally-based federalism, sometimes ethnic federalism – though ethnic federalism presupposes further ethnic elements in institutional organization and in political mobilization) or by giving precedence to other criteria like geography, demography and financial capacity (this is normally called *territorial federalism*). There are also mixed forms in which some units are drawn in accordance with settlement patterns of one community and others based on different, e.g. geographic grounds. For instance, in Canada the province of Quebec is culturally based, while other provinces are not. *Culturally based federations*, are normally formed based on a consensus of culturally distinct groups that want to enjoy the advantages of a common state. For instance, Ethiopia has nine ethnically based states, whereas some are ethnically homogeneous and others are home to dozens of ethnic groups. Switzerland is an interesting example. The older Swiss constitutions identified the peoples of the Cantons (Switzerland's federal units) as basis of the federation, acknowledging the political and cultural cantonal diversity. However, federal units were not drawn so as to maximize religious or

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8   This origin is still visible in the official abbreviation of Switzerland CH, which means 'Confederatio Helvetica'.

linguistic homogeneity, for instance creating one federal unit for each linguistic or religious community. Switzerland is subdivided into 17 German speaking, four French, one Italian speaking canton, as well as four pluri-lingual cantons and cantonal borders do not overlap with settlement patterns of religious groups. On the other hand, Germany or the US are *territorially based federations,* which means that the boundaries of the sub-national units are not primarily determined by the cultural diversity in the country but based on other factors[9].

Symmetric and asymmetric federalism. In *symmetric* federal arrangements, all federal units have the same status, same powers as well as the same number of representatives in a second chamber of parliament (like for example in the US, or in Switzerland when disregarding the "half-cantons"). In asymmetric federations, there can be asymmetries based on the distribution of powers, the status of the federal units and the representation in the second chamber. The Canadian federation is broadly symmetric, but contains certain specific sections that apply only to certain provinces. For example, Quebec operates its own pension plans while the other provinces are part of the 'Canada Pension Plan'. In Spain, federal units had to negotiate the extent of their powers, leading to an asymmetric distribution or powers. Today however there is a trend towards more symmetric federalism in Spain. Russia is composed of different kinds of federal units, most importantly oblasts (with a governor and a directly elected legislature) and republics (inhabited by a large minority, they have large autonomy and their own constitution), as well as federal cities and others. In India, there are states and union territories but also autonomous administrative divisions within some of the tribal states. In Germany, not all federal units have the same representation in the second chamber of parliament. Representation is weighted depending on the population size of federal units, providing a higher number of representatives to populous federal units (weighted representation). In Switzerland, though largely symmetric, there are three cantons that split into half-cantons. While half-cantons have the same powers like other cantons, they have only one representative in the upper house instead of the usual two. *Federacies* are states with a specific form of asymmetric federalism: there is only one unit with a right to self-rule and this unit enjoys special representation in central institutions (the one example of a federacy that still exists today is Zanzibar within the federal polity of Tanzania).

Integrated and divided federalism. One of the six elements of federalism is the representation of the sub-units in the institutions of the center. Most often, there is a lower chamber/first chamber of parliament that represents the population of the entire federation and an upper/second chamber that represents the federal units. The rationale for this is to complement the principle of 'one man – one vote' as expressed in the lower house or first chamber with representation of federal units in the second chamber, ensuring a balancing of overall national interests (as expressed by the first chamber) and federal unit interest (as expressed in the second chamber) in central law-making. There are two very different ways how to organize this representation in the second chamber: the representatives in the second chamber can either represent the people (sometimes called *divided federalism*) of the federal units or their governments (*integrated federalism*). In Switzerland (as well as in the United States), the representatives to the second chamber are directly elected by the people of the federal units, two from each federal unit. The federal units are not allowed to instruct the representatives of the federal unit how to vote in the second chamber as their mandate comes directly from the citizens of the federal unit. In Germany on the contrary, representatives to the second chamber are not directly elected and are instructed by their executives. Also, the number of representatives is weighted depending on the size of the population in the sub-units. The distinction whether members of the second chamber derive their legitimacy directly from the people of the federal unit or represent the political institutions of the federal units is an important one. However, in particular the term 'divided federalism' is used only by a relatively small group of experts, mainly because of the potentially negative connotations of the term 'divided'.

Federalism in a parliamentary or presidential system. Furthermore, there are aspects that are not directly linked to federalism but still impact the federal arrangement, for instance whether federalism is introduced in a parliamentary or in a presidential system. In a presidential system, the executive

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9   However, in the case of Germany, the federal units are more homogenous in respect to religion than the country as such. When introducing federalism, religion was however not used as the determined factor for designing the federal units.

is a separate entity from the legislature; the president is not responsible to the parliament and can normally not dismiss it. The United States or Nigeria are prominent examples of federations with a presidential system. In such a system, there are multiple '*checks and balances*': not only a vertical division of powers between different levels of government but also between the different branches of government (executive, legislature and judiciary)[10]. This model in a presidential system has been followed also by the Latin American federations. In contrast, in parliamentary federations the executive is dependent on and accountable to the legislature (parliament). Canada and India are two federal systems with such a parliamentary form of government. Often, and in contrast to presidential systems, when the government is formed based on a decision of the lower house, the second chamber (or upper house) can be institutionally weaker.

Executive federalism. The distinction with regards to the separation of powers and responsibilities within the tiers of government also links to the kind of intergovernmental relations that are created from those two different systems. In *executive federalism* intergovernmental relations are dominated by the executives of the different governments in a federal system. For instance, in Canada, because of the parliamentary system - in which the executive is based on the support of parliament - intergovernmental relations take place mainly involving the executives of federal units as these can normally also 'deliver' the necessary parliamentary support.

Cooperative federalism and competitive federalism. In federations applying *cooperative* federalism, the focus is on cooperation between the centre and federal units as well as among federal units. An example is Swiss forest policy: The federal level is responsible for the preservation of a forest area and its protection. The cantons are responsible for forestry planning and implementation of legislation (federal and cantonal) and the local level is responsible for the forest management and the local surveillance of forests. Often cooperative federalism is juxtaposed to *competitive federalism*. While coopera-

tive federalism emphasizes the cooperation between different levels and units of government, for instance in policy formulation and implementation, competitive federalism stresses competition between the center and federal units as well as among federal units. Federal government and in particular federal units use the right to self-rule to compete against each other, e.g. for the loyalty of their citizens or for attracting enterprises, by developing attractive policies, for instance special tax incentives or by providing better services than other federal units. Most federations have some cooperative as well as competitive features.

Dual federalism and administrative federalism. To some extent related to cooperative and competitive federalism are the concept of administrative and dual federalism. *Dual federalism* emphasizes the division of powers and responsibilities between the different tiers and thus stresses the separation of particular policy fields that lie in the sole responsibility of one or the other level of government. Thus, in a dual federal system, the emphasis lies on the legislative division of powers, where each level of government is responsible for the policy making in its entirety (from agenda setting to law making to implementation), from which also follows that there are two separate strands of public administrations (dual administrations). The United States of America is considered as a prime example of dual federalism with separate policy-making and the federal administration implementing federal policies and laws and state administrations developing and implementing state policies. It also has a dual court system with federal courts adjudicating federal law and state courts adjudicating state laws. In other federations, the public administration of federal units is responsible for the implementation of their own policies, but also for implementing national policies (often called *administrative federalism*). In extreme forms of administrative federalism, almost all policy making is allocated to the center while federal units have some discretion how they implement national policies. In addition, the court system tends to be an integrated one, with the courts of federal units adjudicating federal and federal unit law, with a federal supreme court that weighs over the uniform application of federal law.

Umpire - judicially backed and politically resolved. There are also relatively broad differences in the main means of dispute resolution. From an institu-

10 Some experts, among them Hueglin (2015) call such a system ‚plural' federalism, However, in this publication, we would like to use to word ‚plural' federations for those federations that are characterized by several ethnically, linguistically or religiously based identity groups, as also McGarry or Brendan O'Leary do.

tional perspective, an umpire can be a formal judicial body, an informal political body, or a formal process of popular referenda. While the United States are the most prominent example of a judicial body (the supreme court) that acts as an umpire between the states and the central level, Switzerland is the most prominent example where the umpire is the people through the possibility of referenda. Another possibility, like in the Ethiopian constitution, is to entrust this task to the second chamber, the House of Federation rather than the court. Many federations include political dispute resolution mechanisms (as mediating bodies and platforms for negotiation) as well as provide for recourse to the courts.

Questions:
- In how far is there clarity about the meaning of federalism? What do different debate participants and the wider public mean when they talk about federalism? Do they refer to neighbouring federal systems, to a historical experience or to an abstract idea and concept?
- How is the term 'federalism' understood in the specific context? Is there a local term that is used by the population? How does it relate to 'established' notions of federalism?
- What other terms related to federalism are used and how are they used in the debate? In how far are they useful to structure the debate; in how far do they create unnecessary juxtapositions?
- Have there been experiences with federalism in the past? How have they been perceived? What is the historical development of statebuilding and decentralized forms of governance in the region?
- Are certain elements on federalism (number of tiers/levels, division of powers, constitutional guarantees, intergovernmental relations, umpire) stressed more than others? Why?
- How does federalism fit with other institutional elements of the overall political system (parliamentary or presidential)?

For the external supporter:
- There is not one federal system but there are many. It is important to recognize this variety of federal systems as an opportunity for stakeholders to develop a 'tailor-made' institutional design for the particular context.
- It is important for outside supporters to be fully aware of the different connotations of the term federalism. Before initiating debates on federalism, it is important to understand the historical legacies of the term in a given context. Without understanding the history of the term, one might trigger more conflict than transforming it.
- A discussion on and a common understanding of terminology among the debate stakeholders can make later discussions on federalism design options easier. Furthermore, it tends to be beneficial when also external supporters and experts are using the same definitions and concepts.

CHAPTER 2: WHAT ARE ORIGINS, RATIONALES AND DETERMINANTS OF FEDERAL SYSTEMS?

Where does federalism come from? Like many –ism words such as liberalism, radicalism, humanism etc., federalism is a normative description and refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule[11]. Federalism derives from the Latin word '*foedus'*, which means covenant or treaty. In the Western literature, three traditions of the federal idea can be distinguished[12].

- The first tradition originates from the Protestant Revolution and is linked to the scholar Althusius (1557-1630) who was in favor of autonomy of his city against the then important religious catholic and protestant leaders and who favoured a bottom-up organization of his city with indirect representation of the people through guilds and colleges. He was putting an emphasis on agreements among autonomous communities.
- The American Revolution (Federalist Papers) developed a republican understanding of federalism based on three principles: there are intermediate powers between people and the government, there is a constitutional separation of powers among the branches of government and the large state is organized as a federal republic subdivided into smaller units. This tradition is putting an emphasis on *checks and balances in a society of individual competition* within and across communities. The idea of multi-level governance was amongst others influenced by organizational forms amongst the first nation peoples in Northern America.
- Finally, a third tradition could be called federal socialism which is based on the thinking of Pierre-Joseph Proudhon. This tradition argues that agricultural and industrial workers become self-sufficient and self-governing producers and thus form sub-units within

a larger federation. Here, an emphasis is placed on socio-economic autonomy and council representation.

While there are these *Western traditions*, in which also the Swiss system can be located, there are obviously other traditions of covenant based multi-tiered governance in the Global East and South. For any international support to debates on federalism, it is central to understand the particular traditions of self-rule and shared rule in the geographic context the support takes place.

Rationale for introducing federalism. The rationale to introduce federalism can be manifold. In transition contexts, mainly three rationales are mentioned: a cultural rationale that argues a federal system will lead to more peace and stability in a culturally diverse society, an economic rationale that argues a federal system leads to more economic development and prosperity and a political rationale, that argues a federal system leads to more democracy.

- **Cultural rationale aiming at organizing cultural heterogeneity and establishing peace.** The cultural rationale is often brought forward in debates when a society is characterized by religious, cultural, ethnic, or linguistic diversity. In such societies, a federal structure can be responsive to the different needs and interests of these different groups (self-rule). Decisions that concern the identity of those groups can therefore be taken at the subnational level and conflicts at the higher level of government might be avoided. As important as self-rule is the aspect of shared-rule: a federal system ensures a 'voice' for sub-units in the central institutions. Thus, notwithstanding the size of the federal unit there are institutional features that ensure the political participation of the federal units in the decision making at the central level (i.e. through a bicameral system, or specific coalition formulas). Through participation in central decision-making, the composing units also give legitimacy to the state as such. Constitutional entrenchment and the involvement

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11 Watts, Ronald, 2001: "Models of federal power sharing". International Social Science Journal, 53: p. 23–32

12 Huguelin, Thomas O. / Alan Fenna, 2015: *Comparative federalism: A systematic inquiry,* 2nd ed. Ontario: University of Toronto Press

of federal units in the constitutional amendment process prevent one-sided change. Therefore, the cultural rationale for federalism is one of protection and accommodation of the identity groups within an overall political system. Federalism can balance the interests of majorities and minorities and can shelter minorities from majority rule. Federal systems, depending on their design, therefore might minimize coercion and maximize legitimacy of decision-making.

- **Economic rationale aiming at improving governance effectiveness and efficiency.** The *economic rationale* is based on governance efficiency arguments. It is argued that, depending on the matter and the context, centrally designed and implemented policies might be inefficient as they are not decided and implemented close enough to the people in order to understand their 'preferences'. A federal system allows for tailor-made solutions for the specific context, respectful of regional preferences, and the localized management of particular problems. Depending on design and resource allocation, federalism can enhance the service delivery to people in the periphery, as not everything is centralized in the capital and thus can also form the basis for more equitable development throughout the country. Thus it is perhaps not surprising, that there are several examples in which less developed areas in a country have been the strongest proponents of federalism. Fiscal federalism in developing countries often leads to central redistribution but local provision of public goods. Like this, it can be ensured that the public goods that are produced match the 'preferences' of the local people. If preferences of subsets of the population overlap, there are advantages of creating 'club goods' or 'internalities' for more efficient service delivery based on the economies of scale. While there is an economic rationale for self-rule elements of federalism, there is also a rationale for shared-rule mechanisms: a federation has the kind of institutions and coordination possibilities that help controlling externalities through transferring powers to the joint-decision-making level.
- **Political rationale aiming at multiplying the political arenas.** Federal systems may increase the opportunities for citizens to participate in public decision-making. It can create a multi-level democracy. As there are possibilities for 'deliberation' at the central and sub-national level, more citizens can politically participate. Elections

at multiple levels can ease an all or nothing fight for central positions. Through the different checks and balances (vertical and horizontal) that are introduced in a federal system, there are more 'veto players', more democratic players in a political system, encouraging a balancing of different interests, which might render the political process more democratic and accountable. Thus, federal systems may enhance political participation of different groups that would otherwise be outside the political realm. Finally, sub-national decision-making can also prevent the central level from being a bottle-neck with regards to decision making and the representation of federal units in central decision making broadens the democratic consensus.

Success factors. The historical record of democratic federations is very positive. On the one hand, most of them are economically very prosperous, and on the other, very few of them have broken apart. Still, there are some determinants for the success of democratic federations:

- **The socio-political set-up of a country as a determinant for success of federalism.** Federalism works best if there are more than two identity groups. A federation that is composed of only two equal sized federal units can end up in a situation where one always wins and the other loses. For instance, in Belgium, though there is a German minority, the big cleavage is between the Flemish and the Walloon groups. Creating federal units for each group creates a high probability of deadlocks. In order to counter-balance this, Belgium adopted a creative approach, creating an overlapping system of territorial and community-based federal units. Similarly, a federation where one single group dominates (in numbers or resources), the federal system will not be able to deliver on the protection and accommodation that might have been the rationale for introducing federalism in the first place. At the same time, a federal system with too many groups or strongly intermingled groups might also be problematic if and only if federal units shall be drawn based on territorial settlement patterns of communities, as there is the risk of splitting up into too many and too little federal units. Communities will have competing demands for territory. Finally, while it is relevant to think about the number of identity groups in a federation as well as the feasibility of collaboration, it is more important to under-

stand how these groups are politicized in a certain context. Problems mainly arise, when the institutional set-up incentivizes political mobilization based on identity only.

- **The elites as a determinant of success of federalism.** A second set of determinants is linked to *leadership and elite questions.* If there is no political will of the elite to maintain a federation, it is very difficult to keep the institutional processes on-going. Thus, a federal system relies on the trust and tolerance of the different federal units towards each other, and also to the central state as well as the willingness of the center to share powers with the federal units. Some commentators argue that particularly these 'soft' elements are not always present in conflict-affected or transition contexts.

- **Democracy as a determinant of success of federalism.** For its proper functioning, federalism presupposes democracy. There are a number of countries that consider themselves as federal and/or that have federal constitutions but have serious democratic deficits. For instance, Yugoslavia had a federal constitution but had limited democratic decision-making. The strong role of the communist party rendered part of the federal design ineffective because party-supported policies superseded multi-level democratic decision-making as envisaged in federalism. Similar to the case of Yugoslavia, there are some federal countries where either a (factual) one-party system or the determinant role of other forces, e.g. the military, tribal hierarchies, counteract federalism. Federalism should therefore go hand in hand with a democratization of the country.

- **Costs and capacity as a determinant of success of federalism.** Finally, the fourth set of determinants are questions of capacity and feasibility. There is a tendency to underestimate capacity issues during political debates on federalism, as the aim is trying to get to a 'yes'. Oftentimes there is not enough practical recognition for capacity issues, starting from questions like whether those in charge for drafting regulations for new levels of government and for implementing federalism have the capacity for doing so. Will the new federal units be able to deliver services in their field of authority? What is needed to render them able for doing so? Feasibility is not so much geared towards capacity of personnel that is responsible for the organization of debates or even implementation of reforms, but rather raises questions around financing. How will a newly established

federal system, for example the infrastructure of federal units be financed? Or through what kind of system of public finance will federalism be consolidated? In many cases, different stakeholders differ in their assessment of capacities. For instance, the center might be convinced that federal units are not 'ready' for self-rule while federal units disagree. The center might argue that a certain area doesn't have the resources to function as a federal unit while those from the area believe that given the chance they will be able to develop their area and raise resources. In some cases, the transfer of powers was done in phases and linked to capacity criteria. In such a case, this can lead to an asymmetric system of federalism. Problems mainly arise when the regions advocating for federalism are deemed (possibly by the center) as not having enough capacity. If capacity is taken as an indicator it needs credible opportunities for federal units to catch-up and to gain the required capacity.

Figure 2: success factors
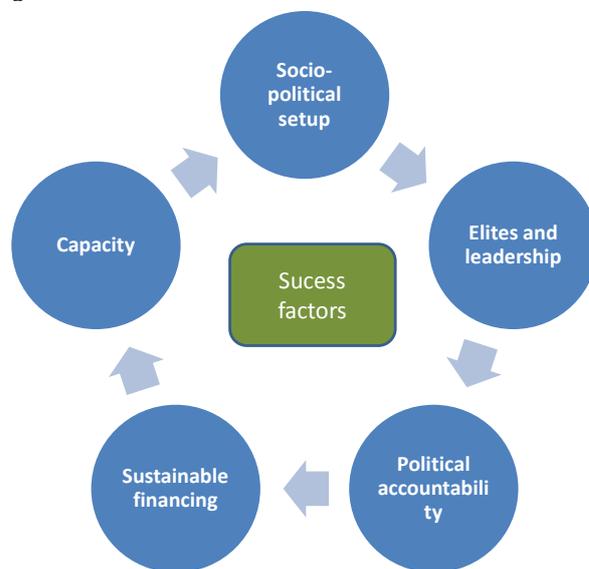
Source: Andrea Iff

Opportunities and risks of introducing a federal system. Introducing federalism can cause opportunities but also has risks. In the following, a selection of possible opportunities and risks are summarized:

Opportunities:
- Federalism can enhance economic development in peripheral regions. With the attribution of own decision-making and fiscal powers, federal units have the opportunity to devise their own devel-

opment policies, invest and develop their own resource revenues which might lead to more economic activity. As such, federalism can also lead to less economic pressure for the centre or the overall federation.

- Federalism can enhance policy making and implementation. Federal units can serve as laboratories[13] for developing policy as well as implementation approaches, providing a broad range of different problem solving approaches. Over time it will become clear which approaches are most successful. Finally, successful approaches might be introduced in the other federal units, too.

- Federalism can provide for politics that acknowledges different preferences. Based on the right of self-rule, federal units can provide services that are in line with the preferences of the concerned populations.

- Federalism can enhance access of the citizens to services when services are provided by the federal units instead of being centralized.

- Federalism can lower political conflicts and competition at the centre, as there is more than just one political arena that is important. Policy fields that are potentially divisive at national level can be left to the decision-making at lower levels. Federalism can lead to a higher number of attractive political positions. For instance, a position as a minister of economy in an economically strong federal unit might be of similar attractiveness as a position of minister at the centre. Losing an election at the center might be less painful if the same party wins elections in federal units.

- Federalism can lead to diversification of the political elite – depending on the electoral system – and provide room to include for instance not only the elite members of former warring parties in decision making but also others. Politicians (male and female) can gain experience at lower levels of government, which potentially have a lower entry threshold, and progress to positions at the center.

- Federalism can provide avenues to empower formerly excluded parties or groups that are territorially concentrated without the need to create explicit guarantees or quotas. Federalism can lead to a thriving political arena, where different groups and regions are able to participate in the political system and support the overall prosperity and development of a country.

- Federalism can mitigate secessionist demands. Self-rule provides avenues for own decision-making. Through shared rule, there are avenues to balance different interests and different groups provide legitimacy to the overall state.

Risks:
- Though federalism is not necessarily more expensive than other systems of state organization, in particular the implementation of federalism will need additional resources. The introduction of federalism can lead to resource constraints when new infrastructure has to be developed at the level of federal units, when additional political positions as well administrations for federal units are created. Federalism will increase administrative costs if the transfer of powers to the federal units does not lead to a restructuring and downsizing of the central administration.

- The introduction of federalism can lead to a gap in service delivery or in funding, when the handover of powers and resources are not properly coordinated or federal units are not ready to assume powers and resources.

- Federalism risks frustration if powers for decision-making and service delivery are transferred but not the necessary resources. Federal units might have political power, but do not have the administration or the finances to deliver the promises.

- If federalism is purely oriented towards competition and there is no system of balancing financial capacities poorer regions might become even poorer.

- Federalism provides powers and resources to federal units. These might be used to prepare and fund regional conflict or secessionist movements. However, federations are not more prone to conflict and secession than unitary countries.

- Federalism risks 'elite capture' in newly established regions. Without the necessary democratic processes, a federal system might allow for elites in the regions to establish their own 'small kingdom'. Thus, regional elites might capture the power over a federal unit, capture the local administration, and be involved in corruption.

- The creation of federal units will create new regional minorities who might need special protection.

- Federalism risks that policy making becomes too complex, as there are more layers of governance and the need for coordination among different levels of governance rises. Without the neces-

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13 Oates, W. E., 1999: An essay on fiscal federalism. Journal of Economic Literature, Vol. 37: p. 1120-1149.

sary institutions of 'intergovernmental relations', the new transfer of powers might lead to situations where service delivery is hindered because of the sheer complexity of the administrative processes.

Questions:
- What experiences of compact-based multi-level governance exist in the region? In how far is federalism taken as a foreign concept or linked to the own traditions?
- What rationales resonate with the participants of the federalism debates? Do different groups bring forward different rationales for federalism? How does this influence the debate?
- What is the internal socio-political set-up of the country? What are the different cleavages that exist and that are being emphasized in the debate? Under what conditions could other cleavages become politicized in the future?
- In how far is there political will for a federal system? In how far do the political elites trust each other and are ready to collaborate at the central level? In how far is the centre willing to transfer own decision-making power and resources to lower levels of government?
- In how far does the country have the capacity to deliver on the 'promises' of federalism? What capacities have to be further developed?
- In how far is there a political will of the composing group to uphold a federal system? What creates hesitancy? How can the political will be strengthened?
- How do different stakeholders perceive the risks and opportunities of a federal system? Is there an open debate on opportunities, risks as well as mitigating factors?

For the external supporter:
- The own experiences and background of external supporters will also influence their perceptions of the debate. Openness about the own background as well as on opportunities and risks can provide credibility.
- It is important to be aware that there are opportunities and risks connected to federalism and to assess from time to time in how far opportunities and risks are materializing.
- There can be phases during the federalism debates when a lot of attention is focused on perceived advantages and disadvantages of federalism. It is important to note that whether federalism will do harm or achieve its goals amongst others depends on the federal design as well as other aspects of governance.

CHAPTER 3: **WHAT ARE 'ALTERNATIVES' TO FEDERALISM?**

Other options for territorial organization and for the accommodation of diversity. Federalism is of course not the only form of state organization. Only about one-fourth of all countries worldwide opted for it. In the following sections other forms and aspects of state organization will be discussed. We think it is important to talk about alternatives for the following reasons:

- In many debates on federalism, alternatives are also discussed: often at the start when there is a discussion whether to introduce federalism as well as during later stages, for clarification purposes or when doubts on the appropriateness of federalism in a particular context are raised.
- Furthermore, there are more and more hybrid arrangements that borrow features from federalism as well as other principles, like constitutionally guaranteed decentralized systems.
- In addition, in a majority of countries different approaches to territorial organization or accommodation of diversity exist 'next to each other'. For instance, in Switzerland the relations between the center and the federal units are clearly federal, while relations between the federal units and local governments are decentralized.
- In addition, federalism only impacts on certain features of state organization and there is a huge variety of options how to design a federal system. Federalism often has to be complemented with other approaches, e.g. with guarantees for minorities within federal units.
- Considering alternative or complementary approaches to federalism increases the potential for compromise. For example, when there are group demands for more political inclusion there are different options: relying solely on federalism, e.g. by demarcating federal units based on the settlement patterns of the groups (which in a specific case, might create new problems or be unacceptable to certain stakeholders) or combining approaches and for instance demarcating federal units based on other criteria but introducing additional approaches for group accommodation.

Knowledge of the spectrum and diversity of options of state organization can help identifying features that cater to the needs and interests of the specific country and its population. In a first step, alternative territorial approaches will be discussed; in a second step potentially complementing approaches to accommodate multiple identity groups within one state will be further explored.

Territorial approaches
Alliance – league - confederal – federal – unitary. Alliances, leagues, confederation, federations and unitary states form some kind of continuum in respect to how concentrated or dispersed sovereignty is, with alliances as a relatively loose form of cooperation between states in which each states maintains full sovereignty, confederations as a model of coordinated sovereignties, and the unitary state as the classic state with concentrated sovereignty. The five models of alliance, league, confederation, federation and unitary state will be quickly looked at further down.

Figure 3: Continuum of Sovereignty

Source: Adapted from Huguelin[14]

14 Huguelin, Thomas O. / Alan Fenna, 2015: Comparative federalism: A systematic inquiry, 2nd ed, p. 35. Ontario: University of Toronto Press

Though one can speak of a continuum in respect to sovereignty, there are qualitative differences between the different forms of state organization.

Difference between a federation, confederation, league and alliance. Confederations, leagues and alliances have more dispersed sovereignty than federations. Federations are clearly considered as one state. As such, it is the federation that is the addressee of international law and not the different federal units. A *confederation* is a union of states, where the member states transfer some of their powers to one or several common institutions. Often, changes in the organization and decision making structures require unanimity of all member states. The member-states can remain the addressees of international law. An example of a confederation was Serbia and Montenegro until the latter decided to become independent. *Leagues of states* are composed of independent countries that come together permanently or for a limited time period in a formalized form of cooperation but do not necessarily transfer existing powers to the league. An example is the League of Arab Nations that aims at coordinating cooperation among and protecting the independence and sovereignty of Arab countries. An *alliance* of states finally is a collective of states that seek cooperation on particular policy aspects for furthering their shared interests; one among many examples is the Alliance of Small Island States that was formed basically to support each other in defending particularly the interests of small island states in the discourse on global warming and its effect on coastal regions.

Similarities between unitary and federal systems. The most obvious characteristic of federal systems is that they have at least two levels of government, like Switzerland has its cantons, Canada its provinces or India its states. But then, also France as a unitary country has regions as well as other lower levels of government and Indonesia local governments. Similarly like in federations, in unitary states, lower levels of government can be attributed with own political institutions, decision-making powers and resources. Therefore, also subnational units in unitary systems can have a right to self-rule. Also, the degree of self-rule – the amount of powers – is not necessarily higher in federations than in unitary states. There are relatively centralized federations, leaving little decision-making power to federal units and highly decentralized unitary states attributing their subnational units with a high degree of pow-

ers. In short, "self-rule" or the degree of "self-rule" is not the main difference between federal and unitary states. Subnational units in unitary states can have a similar amount of autonomy as federal units. The following table includes unitary and federal states as well as hybrids (states that combine federal and unitary features) and demonstrates that unitary and federal states (as well as hybrids) provide different degrees of self-rule.

Table 2: Degree of centralization

		Type of constitution		
		Unitary states (144)	Hybrids (22)	Federal states (26)
Degree of self-rule	low	e.g. Chad Vietnam	e.g. Indonesia Azerbaijan	e.g. Malaysia Belgium
	high	e.g. Norway Denmark	e.g. Italy UK	e.g. Canada Switzerland

Source: based on Pippa Norris[15]

Differences between unitary and federal systems. *So what is the difference between a unitary and a federal state?* The qualitative difference between federations and unitary states amounts from the other two elements of federalism. First, powers of subnational units in unitary states are not necessarily constitutionally guaranteed. In unitary states, lower levels of government derive their powers from the central government or legislature – through legislation, and in principle, the central government could take them *'away'*. A famous example of such a withdrawal was the move by the UK Prime Minister Margaret Thatcher in the mid-1980s when she abolished the Greater London Council in order to tame down a stronghold of the labor party. In comparison in federal systems, powers are distributed between the levels of government and neither can unilaterally alter the powers of the other because the powers are enshrined in the constitution and the constitutional amendment procedure involves the federal units. Second, in unitary states, subnational units are not repre-

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15 Norris, Pippa, 2008: Driving democracy: do power-sharing institutions work? Cambridge: Cambridge University Press

sented in central level decision-making - there is *no guaranteed* shared-rule - while in federations federal units are represented in the second chamber of parliament. These two elements also distinguish special autonomy arrangements from federacies. Federacies are federal arrangements with just one federal unit in an otherwise unitary state. This federal unit has some autonomy (self-rule) but in addition it has a special say in central decision-making and its status is entrenched in the Constitution (e.g. Zanzibar in respect to Tanzania) while special autonomy arrangements (e.g. Finland/Åland, Philippines/Mindanao, Indonesia/Aceh) do not have special representation in central decision-making and are not necessarily entrenched in the constitution.

Hybrid systems. There is a mounting number of hybrid systems, that are neither clearly federations nor unitary states, or that neither fulfill all elements of confederations nor of federations. The most frequent form of hybrids are unitary states that constitutionally guarantee the status of and attribution of powers to subnational units or autonomous areas. Organizations like the European Union move more and more from a system that resembled a confederal to a federal one.

Table 3: Overview: Unitary, federal and confederal arrangements

	Separate States (Secession, Leagues, Alliances)	Confederation	Federation, Federacies	Unitary State Devolution, Decentralisation, special autonomy	Unitary State Deconcentration
	Separate political systems	**Yes**, states forming the confederation remain sovereign states	**Yes**, federal units have genuine decision-making powers in the field of competencies, own political institutions, administration, finances	**Yes**, decentralised units have genuine decision-making powers in the field of competencies, own political institutions, administration, finances	**No** genuine decision making power, deconcentrated institutions are agents of central government
		Yes	**Yes**, federal units are represented in central institutions, e.g. second chamber of parliament	**No**, no special representation required	**No**
		Treaty based, high level of entrenchment	**Constitution**, i.e. high level of entrenchment	**Statute** i.e. low to medium level of entrenchment	**Regulations** or higher, i.e. low level of entrenchment

Source: based on Nicole Töpperwien[16]

Unitary states and decentralization in particular
Unitary states in particular. Currently, most federalism debates take place in unitary states and in many cases there are some groups who want to remain

with the (same or a reformed) unitary system while others would prefer to introduce federalism. Therefore, a closer look at unitary systems and at different approaches for attributing powers to lower levels of government within unitary states is merited. Four terms are particularly used: decentralization, devolution, deconcentration and delegation. Some consider that these are four distinct concepts while others take decentralization as the catch-all term for the other three. In the latter sense, decentralization embraces a variety of concepts. In this understanding, decentralization describes the *'transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organizations and/or the private sector'[17]*.

Table 4: Exploring decentralized systems

Question	Possible options
Which powers/ activities are transferred?	For instance, agriculture, health, education
What type of power/activity is transferred?	For instance, policy making, law-making, taxing powers, spending powers
To which level is the power/activity transferred?	For instance, regions, district, locality, villages, cities
To whom is the power/activity transferred?	To a political body, admin. body, private sector
What powers of control and supervision remain with the centre?	For instance, possibility to revoke powers, to implement on behalf of the subnational unit, to remove office holders, to coordinate, to define and enforce common standards of service-delivery, to approve budgets
What are the legal/administrative means?	For instance, powers are guaranteed, transferred through the constitution, legislation, guideline

Different aspects of decentralization. Decentralization (and in particular devolution) is often regarded as easier to implement and a less controversial alternative to federalism. Three different aspects

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16 Töpperwien, Nicole, 2009: Federalism and Peace Mediation, Mediation Support Project.

17 Definition by the World Bank: Accessed online (August 2016) http://www1.worldbank.org/publicsector/decentralization/what.htm.

of decentralization are distinguished: political, administrative and fiscal decentralization. These aspects are also used to distinguish devolution and deconcentration later on:

- Political decentralization. Decentralized units have their own political institutions deriving their legitimacy from the citizens of the decentralized unit. Citizens elect representatives not only at the national level, but also at this regional, district or local level or take decisions through direct democratic means. Political institutions have political decision making authority for a set of powers and responsibilities. At the same time, political institutions and their representatives can be held accountable for the implementation of those decisions.
- Administrative decentralization. Decentralized units plan, manage and implement public services, either based on their own authority or based on the authority of the center. If they act on authority of the center, for instance implementing central policies, administrative decentralization presupposes some discretion on how to implement. Administrative decentralization normally also includes a degree of autonomy in hiring staff and defining their wages.
- Fiscal decentralization. Decentralized units are allocated with some own resources that can be spent at relative discretion. Revenues can be either raised at the subnational level or transferred from the central level. In developing countries, the tax base of local units is often low, giving more significance to service fees and other resources (e.g. natural resources) as well as transfers from the center. In particular, when these transfers from the center are conditional (ear-marked for a particular use), the dependence on the central government can be high and own decision-making power is reduced.

Table 5: Aspects of decentralized systems

Aspect of decentralization	Options/ elements	Examples of hoped-for outcomes
Political decentralization In how far do subnational units have their own political institutions and decision-making powers in defined policy fields?	Directly or indirectly elected assembly/parliament; elected or appointed government accountable to the assembly/to the people of the decentralized unit	Legitimate decision-making based on preferences of local populations, political accountability, political transparency, political representation, local democracy and space for public participation
Administrative decentralization In how far do subnational units have their own administration and powers to decide how to best implement services'?	Decentralized units have their own administration, decide on staffing and wages; implement their own policies, implement policies of the center with some kind of discretion	More effective and efficient service-delivery based on the preferences of the local populations, accessibility of services, administrative capacity throughout the country.
Financial decentralization In how far have decentralized units own resources and can decide on the use of these resources?	Possibility to raise taxes, set tax rates, manage natural resources, receive conditional or unconditional grants, make and pass their own budgets, can borrow, decide on spending, do their own financial controlling	Spending of resources based on the preferences of the local populations, easier access for resource mobilization, incentives for local economic development, overall improved financial capacity

Devolution. The term devolution is normally used when the central government transfers authority for decision making, finance and management

to subnational governments, in different words when subnational units have political, administrative and financial powers, in the above mentioned sense. Some use the term in a narrower way when powers are de-evolved, i.e. given back to subnational units that in the past had had a certain amount of authority, e.g. in the context of Scotland.

Deconcentration. Deconcentration occurs when the central government disperses responsibilities for certain services to regional, district or local branch offices of their central ministries (deconcentrated units of the central government) or a public service delivery organization. There is often none or limited discretion how to implement. Resources for implementation come from the national budget. The local branch offices are under the jurisdiction of the central government. For example, the Ministry of Agriculture places administrative offices for disease control in the different regions of a country.

Delegation. Delegation describes the transfer of powers to quasi-independent government organizations or to the private sector.

Approaches to accommodate group diversity – consociationalism, centripetalism and multiculturalism

Federalism can accommodate diversity, but... Depending on the federal design, federalism can provide for a particular kind of group accommodation. This is the case, if federal units are drawn based on the territorial settlement patterns of different groups. In such a situation, groups (at least indirectly) 'profit' from the right to self-rule through own decision making and by filling important political positions at the sub-unit level. They can also 'profit' from shared rule if the group can gain representation at the center-level institutions. The advantage of such a territorial accommodation of groups is that democratic principles are in so far maintained as representation is ensured through electoral rules - but there are no additional guarantees for minorities (like quotas). Such a system remains flexible and allows for political mobilization on various grounds, not limited to ethnicity. Thus, if at some point in the future, ethnic group membership becomes less relevant, and political values in the left-right spectrum become more relevant, the federal system can accommodate that change. Indirect group accommodation through federalism can

however also be challenging: minorities within new federal units might fear that they will be dominated by the majority of the federal unit. Or there is a fear that small minorities within the overall country want to achieve 'federal indirect representation' by establishing more federal units (a process that some observers claim happens in Nigeria). Therefore, it makes sense to look at other forms of group accommodation, that depending on the context, can complement federalism.

Alternative group accommodation. Apart from allocating powers to territorial entities, there are possibilities to share power based on group, party or identity affiliation. For instance, policies can favor members of a disadvantaged group in order to undo the effects of past discrimination, 'affirmative action' or in acknowledgement of their permanent special needs (positive discrimination). Such policies can be directed at increasing representation, e.g. through a quota system, i.e. a certain percentage of jobs in the public administration, political positions (legislature and executive) or the judiciary are reserved for members of a particular group. One such example is India. In other cases, minority members are given preference or special consideration in selection processes (i.e. school application or hiring processes) or have special conditions to get licenses for radio or TV frequencies. Group accommodation can include the right to decide on issues that concern them directly, for instance cultural matters or decisions concerning aspects of the school curriculum. It can include guarantees for the language of instruction in schools or on the official use of languages. In the following we focus on some model types or categories of institutional designs for dealing with group accommodation.

Consociations are forms of socio-political organization where ethnic groups share political power through elite arrangements. Normally, consociations include four different features: (a) some form of grand coalition, a government where all groups/political parties are represented. (b) A mutual veto, the possibility for the different groups to stop legal projects that would do harm to their own group. (c) Proportionality, the representation of the different groups according to the proportion they make up in the society. (d) Segmental autonomy, the different groups have the possibility to decide on cultural or identify-based issues themselves through some kind of community laws. While in consociations, the

groups can be divided along territorial entities like in cultural or ethnic federalism, they don't have to.

Multiculturalism describes a set of policies, that promote multiple cultural traditions within a single nation (often, culture is associated with an ethnic group, but does not have to be). Such policies can vary widely, for example they can target the support and financing of particular educational facilities, they can define quotas for schools or other public entities, provide for several official languages or the promotion of cultural diversity. While federations can also propagate multicultural policies, they don't have to and the identity groups might be 'protected' mainly through their 'own' subnational units and not through an additional set of policies.

A centripetal institutional design emphasizes the relevance of crosscutting and moderating cleavages between different groups instead of strengthening them through institutional representation of groups. Thus, centripetalism supports three institutional features (a) electoral incentives for politicians and political campaigns to reach out to and attract votes from more than one ethnic group, and particularly other ethnic groups than their own. (b) areas of bargaining where political actors from different groups have an incentive to come together to negotiate and bargain in the search for cross-partisan and cross-ethnic vote. (c) incentives to form 'umbrella' parties or multi-party coalitions. Such centripetal features are possible within a federal system, particularly when identity groups are not territorially organized.

Table 6: Different socio-political forms of state organization

	Ethnic/cultural federation	**Consociation**	**Multi-culturalism**	**Centripetalism**	**Ethnic nation-state**
Organization of identity	Identity groups are organized in territorial entities and sometimes in political parties	Identity groups are most often organized in political parties	Identity groups are organized in interest or lobby groups	Incentives for mixing ethnic identities and establishing umbrella parties	There is the assumption of one single identity group for one state
Approach	Through the territorially organized federal system, identity groups receive the right to decide upon issues that concern their own identity within their own territory	Constitutionally enshrined institutional guarantees for the inclusion of identity groups in the decision making of the state: members of identity groups have specific rights, that are not dependent on the territory they live in	Specific policies, protect and support the identities of different groups, particularly the most vulnerable and minority ones. Protection is further ensured by a bill of rights	Institutions (particularly electoral institutions) are designed in a way as to crease disincentives to political mobilization based on a particular identity, with the aim of establishing a common identity for a country and balancing multiple interests	A singular identity (culture, religion, and ethnicity) is defined as the state-identity of a country, other identity groups are at best provided minority rights
Methods / Instruments	Powers and responsibilities for policy areas like language, culture or others are devolved to federal units (territorial group rights)	Elites of identity groups have the possibility to influence and even veto decisions that concern their identity; groups are protected and included in state institutions through specific provisions (group rights)	Affirmative action-oriented policies support the minority and most vulnerable identity groups; identity is protected through individual rights (individual rights)	Members of majority identity groups are given incentives to include the vision of the minority groups and integrate their opinions in their policy making	Symbols of identity are omnipresent and other cultures are assimilated or excluded

Questions:

- How 'open' is the debate with regards to different options of the future state organization? In how far and how are alternatives or aspects that could complement the federal system discussed?
- Do the participants of the federal debate understand the main differences between federalism and its 'alternatives'?
- Which of the distinguishing aspects make federalism (or other options) particularly attractive for different stakeholders? Why? What are strengths and weaknesses of the different systems in addressing conflict items?
- In how far is federalism alone likely to address the grievances/interests of the different stakeholder groups? What additional guarantees will be needed?

For the external supporter:

- When a debate is at a stage where it focusses on whether to introduce federalism, external supporters should not be perceived as promoting federalism or any other particular system of state organization.
- It is desirable that stakeholders discuss their own different visions of the future state. Like this, the discussion on state organization and its different options (federalism and others) is not a theoretical discussion on important themes in federal design but rather a discussion that starts from the challenges and responses leading to (violent and non-violent) conflict within a context.
- Sometimes debates on federalism are initiated without discussing the possible alternatives to federalism. A federal system where territorially based ethnic or other identity groups have constitutionally protected powers and responsibilities of self-determination (self-rule) and where they at the same time share political power at the central level (shared-rule), is only one of several possible ways how to organize so called 'divided societies'.
- Being aware of alternative forms of state organization that federalism can be complemented with other approaches can help in the development of options that correspond to the specific context and the interests of different stakeholder forms.
- However, once an official decision for a federal political system is taken, it can be counter-productive when external supporters continue to stress the availability of alternatives or continue using terminology that is associated with alternative models.
- The credibility of an external support team can rise when they are not just promoting one federal system, maybe because it is close to their own culture, but when they offer a whole range of federal designs. It is thus important to be aware of one's own biases and cultural influences.
- Because of the particular history, the colonial past or a hegemonic power in a certain context, there might exist a preference for a particular kind of federal system. As an external supporter, it is helpful to speak about such biases, so that the multiplicity of different designs is not 'silently' narrowed down from the beginning.

PART II: **CONTEXT AND PROCESS**

Contexts in which federalism debates take place. Debates on introducing federalism normally take place in the context of larger reform processes, and as experience shows, a high number of recent federations have introduced federalism while affected by conflict, fearing conflict and/or as part of a democratization process. Of course federalism debates also regularly occur in existing federations. Renewed federalism debates can help to reconfirm and further develop the federal vision and to re-balance the system. All countries, including federations, adapt and further develop their institutions over time. Social and political changes lead inevitably to changes in the goals and interests of the central and sub-national governments. Federal structures have the capacity to adjust to changing conditions and preferences. While much of this publication will also be of interests for federations that think about revising their federal system, this publication particularly focuses on federalism debates that are initiated and conducted with a peace- and state-building as well as democratization perspective and focus on questions whether to introduce federalism and/or what kind of federal system to introduce. In a first step, a short introduction to peace and state-building as well as to democratic transition processes will be given (Chapter 4: Federalism in contexts of peace- and statebuilding & democratic transitions).

Processes in which federalism debates take place. Not only the context, also the process in which federalism debates are conducted matters. Process refers to the political arena(s) where federalism debates take place as well as the rules that are introduced for the debate. In countries that are debating to introduce federalism, the public discourse is often dominated by 'substance' questions like: How will my group, my region be affected by federalism? In which federal unit will my city be? Who will be in a majority in my federal unit? Will a representative from my region be included in the government? Will I be able to join a school where instruction is in my mother tongue? While these questions are very relevant, the process, the way in which the federal design is decided, will impact on the federal design. Therefore, three major arenas for federalism debates will be looked at: peace negotiations, national dialogue processes and constitution-making. (Chapter 5: Federalism debates as part of peace negotiations, national dialogue and constitution-making). The subsequent chapter will take up a process related issue that arises in all arenas – though in slightly different forms, the question of participation in the federal debate. It is easily imaginable, that the federal design will look different depending on who is involved in the federal debates. The federal design is likely to look different if it is negotiated only by former conflict parties than if it is negotiated by including a diversity of stakeholders. A process that is expert driven will likely lead to different outcomes than one dominated by political parties. Who participates and how decisions are taken also impacts on the legitimacy of the outcome. (Chapter 6: Common issue: who shall participate?)

Structuring and managing the debate. Finally, whether federalism debates lead to appropriate and sustainable results will also depend on how the debates are structured and managed. When debates provide room for building visions, identifying interests and finding compromises they are more likely to render sustainable results. In Chapter 7 some issues of structuring the debates as well as managing potential challenges during the debate will be taken up (Chapter 7: On dynamics of debates on substance and possibilities to manage them).

CHAPTER 4: **FEDERALISM IN CONTEXTS OF PEACE-STATEBUILDING AND DEMOCRATIC TRANSITIONS**

Peace-building contexts. Today, the absolute majority of violent conflicts are conflicts within states. Only a small number of conflicts are conflicts between states (though also intrastate conflicts can have trans-border dynamics and implications). According to the Conflict Barometer 2015, prepared by the Heidelberg Institute for International Conflict Research, in 2015 only 10 out of 263 conflicts that involved armed confrontation (in the form of violent crisis, limited war, war) were conflicts between states[18]. Many of the issues that are raised during conflicts concern the power equation within the state. There are competing quests over political power, resources or control over territory. Existing power-structures are challenged with violent means. The Conflict Barometer identified resources and subnational predominance as the two issues that most frequently gave rise to high intensity conflict. In several cases, conflict parties were only willing to lay down arms and engage in peace based on an agreement that the future state organization would be part of the agenda of peace negotiations. In conflict affected contexts, when federalism reforms are meant to overcome violent conflict and to build the conditions to peacefully manage disputes in the future, debates are conducted with a peacebuilding perspective in mind. Peacebuilding "includes activities designed to prevent conflict through addressing structural and proximate causes of violence, promoting sustainable peace, delegitimizing violence as a dispute resolution strategy, building capacity within society to peacefully manage disputes, and reducing vulnerability to triggers that may spark violence"[19].

State-building contexts. While peacebuilding activities earlier often focused on security issues (i.e. demobilization, disarmament, and the reintegration of ex-combatants), today it is understood that statebuilding *has to be part of peacebuilding* (see, i.e the Peacebuilding and Statebuilding Goals of the OECD as well as the New Deal[20]). Statebuilding promotes structures, institutions and processes based on the understanding that the state needs to fulfill certain functions for its citizens: security, legitimacy, the rule of law, as well as basic services. In this understanding, a functioning state is not only dependent on the state institutions itself, but also on other actors (i.e. media, civil society, etc.). Furthermore, based on the insight that the 'right' structures or institutions do not automatically produce legitimate outcomes but that illegitimate processes remained behind a 'façade' of formalist and rule-based procedure, statebuilding shifted its focus from the question of institutions and structures per se to the question of the process how to establish *legitimate* institutions. According to the OECD „Statebuilding is a process to enhance capacity, institutions, and legitimacy of the state, driven by state-society relations. At its core, it is a deeply political process forged out of complex struggles over the balance of power, the rules of engagement and how resources should be distributed[21]." Statebuilding processes pose several challenges. On the one hand, they are often characterized as elite driven, focusing support on those actors that are already in power. This can lead to situations where representatives of a state are not interested in establishing inclusive economic and political systems, but rather adopt a strategy of sit and wait (i.e. until the urgency for reforms based on violence is over), establish democratic hurdles or demonstratively react indifferent to reforms. On the other hand, statebuilding offers the possibility to focus on 'technicalities': reforms are introduced on paper but exclusionary practices are continued behind facades. There is a gap

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18 See, http://www.hiik.de/en/konfliktbarometer/pdf/ConflictBarometer_2015.pdf (June 2016).

19 See, http://www.allianceforpeacebuilding.org/2013/08/selected-definitions-of-peacebuilding (August 2016).

20 The International Dialogue on Peacebuilding and Statebuilding, see http://www.oecd.org/dac/HLM%20one%20pager%20PSGs.pdf

21 Yawanarajah, Nita / Julian Ouellet, September 2003: "Peace Agreements." *Beyond Intractability.* Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder.

between formalistic and rule-based procedures and the politics of the 'facts'. If persistent for several years, such challenges pose problems for the legitimacy not only of the state but also of external supporters. Statebuilding is different from peacebuilding insofar, as it can also take place in a situation where there was no previous conflict, but a state is merely 'fragile'.

Federalism and peace- and state-building. Federalism debates arise in peace- and state-building contexts for instance because federalism can
- change the power-equation within the state;
- be the basis for changes to the resource allocation;
- address imbalances between the center and the different regions;
- accommodate different groups within the state;
- adapt the decision-making processes so that they are more representative, inclusive and focused on balancing different interests;
- contribute to the capability and responsiveness of the state in respect to service-delivery;
- help establish a nuanced political system that responds to overall as well as particular expectations on state-society relations.

Democratic transition context. There are cases in which federalism was introduced as part of a democratization process in the context of decolonialization and currently there are examples in which federalism is discussed as part of democratic transition processes from authoritarian towards more democratic regimes (for instance in some countries in the Middle East). In a context of democratic transitions, federalism debates are part of overall processes that aim at strengthening democratic governance. The classic democratization literature was based on the assumption that the state is a precondition for democracy. Thus, conceptual discussions on democracy have usually not included the state. Today, more often than not, peacebuilding, statebuilding and democratization processes happen simultaneously and influence each other. For instance, elections are themselves meant to create new state authority and institutions. One such example is Myanmar which combines the peace- and statebuilding as well as the democratization perspective.

Federalism and democratic transition contexts. Federalism debates arise in democratic transition contexts because federalism can
- help to deepen democracy, particularly through enhancing the overall legitimacy of the political system;
- enhance inclusiveness, as it allows for possibly formerly left out groups to participate in decision making at the centre;
- boost political participation, as it establishes a multi-level democracy where more people can take part in the decision making at the local, sub-unit and central level;
- support accountability, as it allows people to vote for those people that are responsible for policy making at the different levels of government.

Questions:
- What are criteria that can be used to characterize the particular context in which a federalism debate is taking place (e.g. conflict, fragility, legitimacy of state institutions and the quality of democracy?
- Has there been violent conflict and is the possible introduction of a federal system an attempt to change responses to conflict? What attempts of conflict transformation have already been undertaken? How can federalism per se potentially contribute to peace-building?
- Is there a common understanding of the state, general loyalty towards the state? Has the state to be considered as fragile? Shall federalism be used as part of statebuilding? How can federalism potentially contribute to statebuilding?
- What is the quality of democracy? Shall federalism help to strengthen democracy; shall it create a counterbalance to the possibly majoritarian democratic decision-making at the centre? How can federalism potentially contribute to building democratic institutions and to deepening democratic processes?
- Do formal and actual power-structures correspond? Are decisions made through the constitutionally established processes or are there other informal (traditional) ways of decision-making? Shall federalism be used to formalize power?
- In how far do stakeholders themselves see federalism as part of peace-building, statebuilding or a democratic transition?

For the external supporter:

- When supporting federalism debates, peace-building, state-building and democratization can be overall goals or outcomes that external supporters might want to contribute to.
- When federalism debates are supported within a context of peace- and statebuilding, the relation of the federalism debate to these processes has to be carefully analyzed and monitored. In practice, these processes are interlinked and therefore are impacting on each other.
- External supporters will not always receive an explicit mandate of the government or of the different stakeholders involved in the federalism debate. Work might have to be more informal. If there is a mandate it should be carefully considered who gave the mandate based on what agenda. Working methodologies and visibility have to be adapted to the specific situation.
- Support to federalism can be part of good offices. It is in particular appropriate to conduct federalism debates when a legitimate body in the country decided to introduce federalism. For instance, in Nepal, the Constituent Assembly amended the Interim Constitution to opt for federalism. In Myanmar, federalism is included in the nation-wide Ceasefire Agreement. In Yemen, the National Dialogue Process agreed on the introduction of federalism. These decisions provide a basis to legitimately engage on the topic.
- While parts of the federalism debates will be highly technical, political issues are likely to remain at the forefront. There is a high probability that some federalism related issues will be contentious, dividing stakeholders along the old or new conflict lines. Support to federalism debates, has therefore to be provided in a context and conflict sensitive way.
- If the support of a federalism debate is not conflict-sensitive, it risks to have a negative impact on the context and possibly trigger further conflict. A conflict-sensitive approach acknowledges that the support of federalism debates itself can have an impact on the dynamics between the different stakeholders. Conflict-sensitivity is the ability of an external supporter to understand three steps: (1) Understand the context in which the support of the federalism debate takes place, this basically refers to issues raised in Chapter 7. (2) Understand the interaction between the support of the federalism debate and the context, this has mainly to do with the perceptions of the debate in a difficult context; (3) And

finally, act upon this understanding of the interaction in order to avoid negative impacts on dynamics of conflicts/tensions (do no harm) and maximize positive impacts, contribute to the reduction of tensions/conflicts (do good).

CHAPTER 5: FEDERALISM DEBATES AS PART OF PEACE NEGOTIATIONS, NATIONAL DIALOGUE AND CONSTITUTION-MAKING

Different types but often interlinked processes. Above we defined federalism debates as any kind of discussions or negotiations related to federalism within a political process. In a context of peace- and statebuilding as well as democratic transitions, more formal debates on federalism mainly take place during peace negotiations, national dialogues and constitution-making processes[22]. When federalism debates take place as part of general reform debates, for instance in parliament, the introduction of federalism or changes to the federal design will require constitutional amendments and will therefore also lead to a constitution-making process. As discussed above, each of the three processes can have peace-, statebuilding and democratization objectives. Still, peace negotiations, national dialogues and constitution-making processes respond to specific needs related to the context, have their specific features, constraints and opportunities. These specificities also impact on the federalism debates. For instance, while peace negotiations might be well placed to establish a principled agreement among former conflict parties, national dialogues processes can build a more concrete vision of federalism with broader participation and support. Finally, a constitution making process enables to encompass the vision in a constitution. The three different process-

es are often linked to each other, for instance peace negotiations can lead to the establishment of national dialogue and constitution-making processes. Or, peace negotiations take place as part of or in parallel to national dialogue or constitution making processes. If processes are linked, the question arises how they relate to each other. For example, if a national dialogue process was organized in a participatory and representative way, should the constitution-drafting process still be participatory? And what will happen if the outcomes differ? Shall the elected parliament have the possibility to disregard the outcome of a national dialogue with appointed members? What if the participatory constitution building process comes to different principles than in the negotiated peace agreement?

Figure 4: Processes
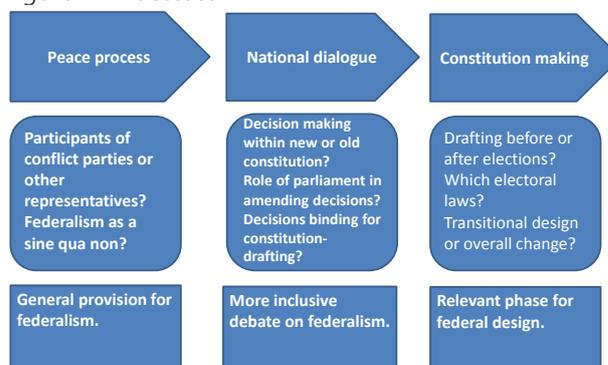
Source: Andrea Iff and Nicole Toepperwien

Peace negotiations

Different forms and agreements. Peace negotiations aim at ending violence and at significantly transforming responses to conflict so that conflict can be addressed through peaceful means[23]. Oftentimes, peace negotiations take place in different rounds or stages and thus provide different kinds of agree-

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22 Several organizations and authors currently use the term „political settlement". The diversity how the term is used is however very high. While some political settlement literature equates political settlements with peace agreements (outcomes), others distinguish the two on the ground that peace agreements are 'events', while 'political settlements' are on-going processes of bargaining leading to 'political deals' among elites and political parties. (E.g. the Political Settlements Research Programme of a North-South Consortium of five organizations.) Furthermore, some understand political settlements as deals among political elites, others as broader processes, some see it as leading to informal agreements that are not really binding while others are looking for institutionalized political practices. The terminology of political settlements has also gained in importance for development actors. They mainly use it as descriptive term for the bargains and pacts of the elites in a particular country. Political settlements thus might best be viewed as longer running process punctuated by events like peace agreements or power-sharing deals that might reshape the overall underlying political settlement.

23 Yawanarajah, Nita / Julian Ouellet, September 2003: "Peace Agreements." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder.

ments. Cessations of hostilities, one-sided or mutual, can be a first step to underline the willingness to enter into negotiations. Longer negotiation processes tend to start through ceasefire agreements. Ceasefire agreements often focus on security and are designed to stop armed groups and the military from fighting. The experience shows that ceasefire agreements can be short-lived and fragile when focusing only on security issues, as they need to be followed with more substantive agreements. Pre-negotiation agreements determine procedural issues of the negotiations (schedules, location, participants and agendas). Interim agreements are steps towards the final agreement and can include substance or process issues and help build confidence between the parties. Framework agreements include broad principles of the substantive issues that will be negotiated, while comprehensive agreements address all the underlying topics of a conflict.

Federalism debates within peace negotiations. Federalism often comes up in those peace negotiations when conflict is about controlling parts of a state's territory. Federalism can be included in all different stages of agreements and there are examples where federalism was already included in the ceasefire agreement almost as a condition sine qua non, thus as a condition to lay down arms. One such example is Myanmar, where the 'Nationwide Ceasefire Agreement between the Government (…) and the Ethnic Armed Organizations' that has been signed in October 2015 includes federalism. In the first paragraph 1a on the 'Basic Principles', it states that: *"In order to achieve lasting and sustainable peace, we agree to implement this Nationwide Ceasefire Agreement in accordance with the following basic principles: a. Establish a union based on the principles of democracy and federalism in accordance with the outcomes of political dialogue and in the spirit of Panglong, that fully guarantees democratic rights, national equality and the right to self-determination on the basis of liberty, equality and justice while upholding the principles of non-disintegration of the union, non-disintegration of national solidarity and perpetuation of national sovereignty."* Sri Lanka is a further example, where in 2002 two agreements were signed, a ceasefire agreement and an agreement on a monitoring body. After those agreements, there were six sessions of peace talks (in 2002-2003), whereas in the third session, the parties agreed *to 'explore a political solution founded on internal self-determination based on a federal structure within*

a united Sri Lanka'[24] and in the sixth session fiscal decentralization issues were discussed. However, the parties did not show clear signs of commitment to following up on those issues that had been agreed upon in the cease fire, and finally, peace talks broke down. South Africa opted for negotiated principles for the future Constitution, including principles with arrangements that can be denominated as federal. There are also examples of comprehensive peace agreements that include federalism in more detail. For instance, the 2005 Comprehensive Peace Agreement with its annexes in Sudan was rich in detail on the future state organization with power- and resource sharing. Also the Dayton Agreement for Bosnia Herzegovina included an annex with a whole federal constitution.

How much detail? When negotiating federalism for a peace agreement, the question arises, how much detail on the future state organization in general and on federalism in particular shall be included in an agreement. Many ceasefire and following peace agreements do not enter into the details of a federal design, but mainly mention that one of the basic principles of the new state structure is federalism. Maybe they mention the most contentious issues, however, most of the specific and detailed issues on the federal system are left to more detailed negotiations or other processes, most often after new elections leading to more 'legitimate' participants of a follow-up process. The postponement of more detailed provisions has the advantage that they can be decided in a more inclusive and comprehensive process; however, postponing details also has its risks. Details would show the overall vision behind federalism. The lack of detail might hide different understandings of what federalism means to whom and what it shall achieve. Uncertainty can influence the level of trust that the parties have in each other. Differences and misunderstandings can hamper the later processes. As shown above, there are also examples in which peace negotiations and resulting agreements dealt with federalism in great detail. An important amount of detail in respect to the future state organization can reassure conflict parties. In most cases, it might be best to adopt a middle way, i.e. to build a common vision and to focus on

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24 See http://www.norway.lk/News_and_events/Relations-between-Norway-and-Sri-Lanka/Peace-Process/ (Protocol of the peace talks from the official website of the Norwegian Government).

principles for the future federal design as a framework for later more inclusive processes.

Who should participate in peace negotiations?
Participants to peace agreements are often more or less limited to the parties in conflict, with potentially negative implication for the legitimacy of such agreements. While the buy-in of conflict parties and elites is a precondition for peace agreements, the sustainability of the peace process will be hampered if the overall population and possibly 'non-involved' groups see the agreement mainly as a possibility for the conflict parties (or other elites) to remain in power. Peace-negotiation literature proposes as a possible solution to this challenge the introduction of parallel or follow-up track two and three processes which include non-official but influential and linked decision makers as well as grass roots and civil society (and not only the 'official' governmental and decision making level). As a general rule, if an agreement should be more long-lasting (e.g. determining the future state organization) and more detailed, the more important is that it is based on broad ownership and not just a consensus among conflict parties. For federalism debates particularly, it is relevant to include additional groups, like regional groups, so that they are already at that stage included on discussions of the future power balance of the overall state and do not get the impression that power will be shared between conflicting parties only. One such example is Sri Lanka, where the negotiators were sensitive to the fact that the relatively small Muslim minority of the Eastern Region had to be included in any agreement between the majority Sinhalese and the minority Tamil groups. National dialogue processes and participatory constitution-making processes are possibilities to ensure more inclusive discussions on crucial issues of future state organization, including federalism.

National Dialogue processes

National dialogue processes are increasingly used to supplement peace negotiations. In particular, when peace negotiations are limited to a rather small group like conflict parties, national dialogue processes can provide platforms for more inclusive participation and can enlarge the ownership of the potential outcomes. Furthermore, it can provide an arena that allows for broader trust building and reconciliation. "The need to be both backward-looking and forward-looking is typical of periods of transition

and political change"[25]. National dialogue processes can also be of use in cases without violent conflict, for instance for giving direction and backing to major reforms or for prioritizing and monitoring the implementation of transition processes. Furthermore, conducting a national dialogue process does not exclude separate follow-up constitution-making processes. Yemen is an example where this was the case. National dialogue processes can build a vision for the country and can develop principles, e.g. of federalism that become part of the mandate of the constitution drafting body.

What characterizes a national dialogue process?
There is no commonly accepted definition of national dialogue. Some use the term for any kind of broader policy dialogue at national level, other use the term more specifically. Here we use the following definition: "National dialogues are negotiating mechanisms intended to expand participation in political transitions beyond the political and military elites[26]". Katja Papagianni summarizes the characteristics of national dialogues by identifying four elements: (a) they are not purely democratic processes, as their participants are not elected but rather appointed or selected by a caucus that is smaller than the overall electorate. (b) they establish their own debating and decision making rules outside the established parliamentary or executive requirements. (c) they try to escape the elitism of peace negotiations but are not yet relying on competitive democratic decision-making. As such, in a national dialogue it is not so much the outcome that is relevant, rather it is the method of how to bring people together, the process. The main aim of a national dialogue is to establish an 'forum that is perceived as *legitimate* by the main groups of a country'[27]. However, it is still relevant to establish a clear mandate of the national dialogue process: what does the process want to achieve in the end? Without such a mandate, also the best designed process might encounter difficulties.

When do national dialogue processes make sense?
Because of the particular format of national dialogues, they are particularly well suited to respond

25 Gross, Aeyal M., 2004: "The Constitution, Reconciliation and, Transitional Justice: Lessons from South Africa and Israel. 40 Stan." Journal of International Law 47.

26 Papagianni, Katia, 2013: National dialogue processes in political transitions. EPLO

27 Siebert, Hannes 2014: National dialogue and legitimate change. Conciliation Resources, Accord Nr. 24: p. 36-39

to certain challenges in peace, and statebuilding as well as democratization processes.

- **When no elections are possible.** As national dialogue processes are not entirely democratic processes they can be used in situations in which elections seem risky. Sometimes, elections cannot take place because of security issues, like in Yemen. Instead of holding elections, the national dialogue gives the people the possibility to appoint (not elect) participants in a national dialogue that is broader than current political elites. In other cases, elections might be possible security-wise, but elections without prior reforms of state institutions and electoral systems could likely lead to contested results. For instance, if elections are held within the 'old' electoral and party system, they might reproduce the same 'exclusionary' elite system that has led to conflict or revolution. In East Timor, the elections led to a situation where one group had a majority in the constituent assembly, which led to a situation where this majority had no incentive to compromise.

- **When the party system does not provide enough representativeness.** Even if electoral rules might not be exclusionary, political parties are often not very representative in situations of peace- and statebuilding or democratic transitions. On the one hand, it might be difficult to turn former rebel groups or revolutionary movements into political parties 'over-night'. And on the other hand, volatility in party systems in post-conflict or transition periods is very high. Thus, members of political parties tend to change their affiliation frequently, not only depending on their political conviction but other incentives. National dialogues might be a possible way to circumvent this. They might allow for participation that includes – apart from the political and military elite – civil society leaders, as well as youth and women. And, most importantly for federalism dialogues, it allows to include members of peripheral groups.

- **When institutions are not seen as legitimate.** As national dialogues establish their own debating and decision-making rules and exist instead of or in parallel to state institutions, like parliament and government, they provide an alternative to institutions that are considered – for instance – as too closely related with the contested

regime, as non-functional or as corrupt. Because the mandate of a national dialogue tends to be limited, the forum is however not necessarily in competition with the ordinary state institutions. Rather, it can serve as a first step in a statebuilding process, where procedural rules for those institutions might be renegotiated.

Ratification or validation methods for debate outcomes. Also for national dialogues (and even for peace agreements), validation methods are discussed: voting in parliament, (in)formal negotiations with bureaucratic agencies and interest groups but also popular referenda. In the best case, ratification methods have been agreed on in advance and are documented in the procedural documents.

Federalism debates within national dialogues. In terms of federalism debates, national dialogues offer the opportunity to carry debates out of the realm of the elites and conflict parties into broader discussions with other representatives of the society. Debates can focus on whether to introduce federalism or any other form of state organization, or on the different options within a federal design. However, as federalism presupposes constitutional guarantees of self-rule and shared rule, the question will come up how decisions on federalism will be finally anchored in the national constitution. Can the national dialogue decide on constitutional amendments or do the amendment procedures of the 'old' constitution have to be respected? What will be the role of formal state institutions, in particular the parliament, in the amendment process? In the case that a different body will be in charge of constitution-drafting or for adopting and promulgating the constitution, in how far are outcomes of the national dialogue binding for this body? There are no standard answers to these questions, however it makes sense to clarify these questions early on. Some of these questions will be further taken up in the next chapter on constitution-making processes.

Constitution-making processes

According to the handbook "Constitution-making and Reform" by Interpeace, in countries with diverse societies, the constitution is "a contract (...) among diverse communities in the state (…) Communities decide on the basis for their coexistence, which is then reflected in the constitution, based not only on the relations of the state to citizens but also on its

relations to communities, and the relationships of the communities among themselves"[28].To fulfill this function, constitution-making processes have to be transparent, inclusive, participative, and nationally owned[29]. The understanding of constitutions as state-society agreements, is also one reason why constitution-making is considered as a way to overcome conflict and fragility. They build a mutually endorsed basis for coexistence among communities, a common ownership of the state, and legitimate institutions. Constitution-making can be part and parcel of democratic transitions: participatory constitution-making can create democratic experiences and can lead to strengthening democratic elements in the constitution. In a peace-building context, constitution-making processes are often preceded by a peace agreement or a national dialogue process. To some extent constitution-making processes can resemble national dialogue processes, in particular when the constitution-making process is inclusive and participatory. The main distinction is the outcome document. While the focus of the national dialogue process is on dialogue and the outcome document need not necessarily be binding, constitution-making processes are meant to lead to the amendment of an old or the adoption of a new constitution, as the 'highest law of the land'. This has also implications for the process. Constitution-making processes are normally governed by more formal procedural rules including clearly regulated decision-making procedures. Constitution-making processes can of course also take place in stable contexts that are not conflict affected and not undergoing extensive reforms. For instance, Switzerland completely revised its constitution in 1999 (while the reform process started in 1984) in order to update the constitution and to make it more readable for citizens today. It also used it to review its federalism related provisions.

Federalism debates in constitution-making processes. As definitions of federalism and of federations show, the constitution plays an important role in federal designs. The constitution needs at least to describe or name the different units of the federation, provide for the distribution of powers between the center and federal units, determine the role of federal units in national decision-making as well as in the constitution amendment procedure. The introduction of federalism requires constitutional change, and in many cases, countries opted for drafting and promulgating entirely new constitutions. Thus, once a decision for federalism is taken, this decision almost always leads to establishing a constitution-making process for amending the existing constitution or drafting a new one. Constitution-making processes are an important arena for federalism debates. While federalism debates in peace negotiations and national dialogue processes can remain on a rather abstract level, e.g. as more abstract principles, the constitution-making process will have to achieve a considerable level of detail.

Constitutional continuity. As mentioned above, constitution-making processes tend to be more formal processes than peace negotiations and national dialogues. In general, the constitution defines the process and requirements for its amendment and replacement. In particular, when the introduction of federalism takes place in a context of peace-building, the question almost always arises whether the introduction of federalism has to be done based on adherence to the still legally valid but perhaps highly contested constitution or whether a new procedure and new requirements can be defined. Often, groups attached to the old regime will insist on legal continuity in order for the reform to be legitimate[30] while those opposed to the regime might consider the current constitution as illegitimate and argue that using the amendment procedure will taint the legitimacy of the new arrangements. This kind of discourse is currently visible among stakeholders in Myanmar: The Nation-wide Ceasefire agreement of October 2015 established that the future state organization of Myanmar shall be federal. Based on this ceasefire agreement, a Political Dialogue is currently (2016) prepared to render the country fully federal however, at least some constitutional amendments are necessary. Yet, not all stakeholders see the current constitution as legitimate. Also, it is not yet completely clear how the Political Dialogue will feed into either a constitution-making or amendment process. In the case of the split of Czechoslovakia stakeholders agreed to follow the 'old' process for amending the constitution. The 2001 Ohrid Frame-

28 Brandt, Michele / Jill Cottrell, Yash Ghai & Anthony Regen, 2011: Constitution-making and Reform, Options for Process. Iinterpeace, p.15.

29 Brandt Michele / Jill Cottrell, Yash Ghai & Anthony Regan, 2011, Constitution-making and Reform, Options for Process, interpeace p.9.

30 Anderson, George / Choudrj Sujit, 2015: Constitutional Transitions and Territorial Cleavages. International IDEA

work Agreement of Macedonia included an Annex with constitutional amendments. These were - with some adjustments – adopted by parliament through the regular constitutional amendment procedure. In even other cases, peace agreements led to the clear decision to draft entirely new constitutions. For instance, in Nepal, the constitution-making process was the outcome of the Comprehensive Peace Agreement. An Interim Constitution defined the constitution-making process as well as the decision-making procedures for the adoption of the constitution. Often, the constitution-making process starts with the negotiation of ground rules, development of interim documents or immutable principles that set the 'rules of the game' for the process.

Interim constitutions. Particularly in conflict-affected and fragile environments (but not only), interim constitutions are an interesting and of late a more frequently used tool as it offers the possibility to (a) allow for a transition period where more stable conditions finally allow for a more durable and sustainable constitutional project than in a situation of recent turmoil (like in South Africa), (b) establish the rules of the constitution-making process (like in Nepal) as well as the composition and mandate of the constitution-making body[31], (c) experiment with certain solutions before they become more permanent, and (d) to implement change more gradually. There are 13 states altogether that have until today used this instrument, among them Libya and South Sudan, India, Pakistan, Iraq, Indonesia and Nepal. One of the most cited examples is the 1993 Interim Constitution of South Africa, which included the provisions for the constitution-making process as well as in an annex a set of negotiated constitutional principles that had to be adhered to by the constitution-making body.[31] There might be some risk that the life-time of an interim constitution is longer than planned, possibly because the power struggle in a country is such that no permanent constitution can be established (as is still the case in South Sudan). This can pose problems but does not need to: Germany still has its after-war constitution that is called "Fundamental Law" instead of constitution because it was not meant to be permanent (a constitution should have been adopted after the unification of East and West Germany). In Nepal it was

more problematic: Though the Interim Constitution was relatively comprehensive it was drafted in the expectation that the constitution-making process would be concluded within two years and assumed that the next elections would already have taken place under the new constitution. Therefore, it did not provide for new elections in case of a prolonged constitution-making process. This led to a constitutional crisis in 2012 when the constituent assembly and parliament dissolved without the promulgation of a new constitution.

Grand new designs vs. graduated change. Interim constitutions provide the possibility of a transition period during which the main focus is still on compromise among conflict parties, for the sake of a smooth transition. For permanent constitutions, stakeholders who want change tend to have higher expectations. They expect that the permanent constitution will reflect what they fought for, embody their values and preferences as well as their new vision for the country. More often than not, when new constitutions are drafted in conflict affected countries, these constitutions are expected to mirror a grand new design and, depending on the context, federalism as part of it. Expectations in a constitution-making process and the change that it can provide tend to be high. Compromises that might happen during the constitutional process are hard to explain to a constituency that suffered for their values. However, for those who are comfortable with the status quo, who have to relinquish power, who are not sure about their own transition, for instance from armed group to political party, or who fear that their values and beliefs will not be sufficiently reflected, the 'grand new design' and a fast implementation might be experienced as threatening. They might also lose face towards their own constituency that defended ideals that are expressed in the status quo. There can also be fears that too speedy change will lead to instability. Gradual change that eases the transition from one system to the other and leaves time to adjust might reassure all stakeholders and constituencies. In addition, the implementation of major reforms like federalism will never be possible from one day to the next but will have to take place in stages.

Constitutional federalization in stages. Also in the case of a permanent constitution it is not necessary that all envisaged changes are introduced at the same time. For instance, Belgium introduced fed-

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31 Venter, Francois, 2000 : *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States.* Martinus Nijhoff Publishers

eralism in stages, through a series of constitutional reforms. Also Switzerland when totally revising its constitution in 1999 did not implement all planned reforms at the same time. For instance, many aspects of judicial reforms, the organization of education as well as fiscal federalism were delayed until after the promulgation of the constitution and tackled subsequently through constitutional amendments (for fiscal federalism in 2003), because of the fear that overburdening the constitution-making process with reform issues might increase opposition to it. Nepal considered at times to leave the demarcation of federal units until after the promulgation of the constitution. Iraq left the regulation of the second chamber of parliament to later reforms and empowered different governorates to decide whether they wanted to become federal units later. Furthermore, many details can be left to the legislative process, including for instance the restructuring of ministries, the adaptation of parliamentary procedures for the functioning of the bicameral parliament or the timing and sequencing of the implementation of federalism.

Transitional provision, sunset and sunrise clauses. Graduated change can be achieved through a series of constitutional reforms or by leaving it to the legislative process to define some issues and transition steps. In many cases in which trust is low, such approaches might face opposition. The phases of reform as well as the implementation steps can however already be planned in the constitution. In order to support the transition, constitutions sometimes include sunset or sunrise clauses. A sunset clause is a provision that will expire at a particular date, or once a particular condition is met. It is for instance used to establish a safeguard or protection for one group for a limited period of time. A sunrise clause provides for the coming into force rather the termination of a provision after a specific date in the future and/or upon the satisfaction of specific conditions. For example, in Sri Lanka, a sunrise clause for devolution has been proposed with the argument that maybe the time is not ripe to discuss it, but there needs to be a guarantee for the Tamil minority that this issue will be discussed in the future[32]. The 1996 Constitution of South Africa, the constitution that was adopted based on the 1993 Interim Constitution, includes a whole schedule with transitional provisions, in order to ease the handover of power and the establishment of the new institutions. Furthermore, constitutions can also define the major milestones of the transition (who, when, what, with what kind of resources), the sequencing of elections as well as establish monitoring and steering mechanisms. There can be differences in preference on the sequencing of the transition, including on the timing of elections. Elections can recreate legitimacy. However, if they are conducted too early they might replicate old problems[33]. Finding agreement on the major transition steps already during the constitution-making processes can avoid disputes during implementation.

Political arenas of constitutional processes. Most constitutional processes take more than a year (even up to a decade) to be completed. There are a variety of process options for establishing a new constitution[34]. We can distinguish different phases/elements within a constitutional process; but not all constitutional processes go through all of the phases and they might overlap[35]:

- negotiations among the main political parties;
- broader dialogues involving other political or societal actors;
- drafting of the very text of the constitution; and
- deliberation and ratification.

If the aim is transparent, inclusive, participatory and nationally owned constitution-making, all the above elements are needed. In the end, a constitution needs elite buy-in as well as broad national ownership if it is supposed to be sustainable. Deliberation and ratification are needed to provide the constitution with validity. Different stages/elements will require different actors (e.g. political leaders, representative bodies, experts, civil society organizations, other interest groups, citizens) and might require different platforms, formal and informal ones.

Drafting and debating the constitution. There are different bodies that can be given the main respon-

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32 Welika, Asanga "Constitutional Reform: A Liberal Wish List" on Groundviews (http://groundviews.org/2015/03/24/constitutional-reform-a-liberal-wish-list)

33 Gluck, Jason, 2011: Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia. United States Institute of Peace

34 Widner, Jennifer, 2007: Constitution writing in post-conflict settings: An overview." Wm. & Mary L. Rev. 49: p. 1513

35 Anderson, George / Choudrj Sujit, 2015: Constitutional Transitions and Territorial Cleavages, International IDEA p. 12

sibility for the drafting of the new constitution: for instance, a constitutional assembly/convention, an expert commission, or a committee of the legislature. Constitutional assemblies tend to have the advantage that they can be composed in an inclusive and representative way, adding credibility to the process. However, it will need specific expertise for the technical aspects of drafting the constitution. Thus, while expert committees might be composed in more or less representative ways, expertise relevant to constitutional choices should be the main criterion for their selection. In many cases, expert drafting bodies have the mandate to develop constitutional proposals which are then debated in a more representative body, a constitutional assembly or parliament. Often, debating and drafting bodies will be organized in sub-committees looking into particular issues. Sometimes, debates on federalism might take place in one such sub-committee but it is more likely that issues that will have an effect on federalism are debated in several sub-committees.

Ratification bodies. There are also different options for ratification bodies for constitutional proposals. Sometimes this is the executive, sometimes it is the legislature, the constitutional assembly/convention or even the people through a referendum. Examples where a referendum had positive impacts is the transitional constitution of South Africa in 1992. What the referendum particularly achieved was that it limited the role of violent opposition groups through the engagement of broader segments of the society. At the same time, a referendum could also have serious risks like in Kyrgyzstan 2010 which was finally not implemented by the autocratic political elite. Referenda only provide the possibility for a 'yes' or 'no' vote. Referenda are only helpful if both yes and no are acceptable solutions. Ending a long constitution-making process with a no-vote in a referendum without a solid plan B can put the whole transition at risk. For the ratification of constitutions in the legislature, normally, a special majority is required (i.e. 60 or 75 percent instead of 50 percent), or there is a veto right for identity groups. In Nepal, a threshold of two-thirds of the Constitutional Assembly was required for adoption. Also in the case of a referendum, special majority clauses or veto rights might apply in order to protect identity groups. In Iraq, the ratification of the new constitution 2005 was by referendum with the special majority requirement that any three regions voting no by a two-thirds majority could stop the ratifica-

tion process. This safeguard was designed to protect the Kurdish minority in the North of the country.

Questions:
- Is federalism supposed to be part of a strategy for peace? Is federalism a 'sine qua non' to enter peace negotiations?
- How comprehensive is the peace agreement supposed to be? What is the breadth and depth that is required for federalism debates to establish trust between the parties? What are those issues that can be postponed, what are the issues that need to be defined in the peace agreement?
- What are the objectives, what is the mandate of the 'National dialogue'? In how far and to what detail shall federalism debates take place as part of the 'National Dialogue'?
- Within which wider strategy does a 'National Dialogue' take place? What is the size and composition of the 'National Dialogue' process? What is the relevance of federalism within this wider dialogue? In how far does the 'National Dialogue' provide for inclusion or participation of civil society and other actors? What are the decision-making powers of the 'National Dialogue'? How does the 'National Dialogue' relate to other processes, e.g. to a negotiated agreement, to a constitution-making process?
- Do people understand the concept of constitution and the place of federalism within it? Is the constitution an accepted instrument for governance?
- How shall the constitution-making process be structured? Does the constitution drafting body have a clear mandate? Are there for instance certain negotiated key principles that the constitution drafting body has to adhere to? Who decided upon them? Or is the drafting body completely free?
- What kind of model is chosen for the drafting body and what does the representativeness of the body mean for a federalism debate? What is the role of experts? Are all possible future sub-units represented in the body? Why or why not?
- Is popular participation (i.e. a referendum) envisaged for a review of a constitution or for the establishment of a new constitution?
- In how far are interim arrangements considered? What are avenues for a smooth transition from war to peace, towards more democracy and from unitary to federal state?

For the external supporter:

- Whenever possible it is recommended to engage on process, e.g. by providing advice on process design, by providing platforms and/or facilitating discussions between and within stakeholder groups, or by supporting participatory approaches. Engagement should at least be in a process-sensitive way, for instance by paying attention to the sequencing of debates when requesting experts, by preventing that the own support contributes to forum shopping, by carefully selecting stakeholders to engage with. Space for dialogue, assistance in the search for common ground, help in reframing and refocusing the debate on the vision and the to-be-addressed challenges might be needed.

- The inclusion of debates on federalism within peace negotiations can serve to establish trust between the parties. This trust might stem from a common vision for the future based on self-rule and shared rule.

- If possible, decisions concerning federalism in peace negotiations or in a national dialogue should remain on a level of principles that show the underlying objectives, for instance a principle on the naming of federal units could be: 'the names of federal units shall be selected so that all communities within the federal unit can identify with it'. Any kind of federal design needs to be enshrined in a future constitution. If possible, details of a particular federal political system should be left to a constitution-making process. Details could for instance encompass the name of the federal unit.

- National dialogues can be very attractive for enhancing inclusiveness and the ownership of peace processes. Also, they can include backward and forward looking aspects promoting reconciliation. At the same time, it is important that national dialogue processes have precise mandates: a too broad agenda, the involvement of a multitude of stakeholders and unstructured facilitation might render them inutile and just achieve a raising of overall expectations that cannot be fulfilled. Technical support, capacity building for participants, even discreet coaching for facilitators, might be helpful to keep a national dialogue process focused in order to lead to tangible outcomes.

- Constitution-making processes have to be nationally owned and should not be externally steered. Thus, external support has to be respectful of the wishes of the populations, for instance through support to informed and inclusive decision-making.

- It will be important for external support to think about quality criteria for a good process, as this strongly enhances the legitimacy of any federal design and as such the chance that such a reform will be implemented.

CHAPTER 6: **COMMON ISSUE: WHO SHALL PARTICIPATE?**

Participation matters. Irrespective of the context and process in which federalism debates take place there are some common issues that need consideration. Here in particular the question of identifying stakeholders and of including them in the federalism debate will be discussed. Who participates is relevant because it is one of the key factors that will influence the perception of legitimacy of the process. In addition, decisions on participation will substantially impact on the outcomes of the federalism debate. In recent years, preference was given to processes that are more inclusive or processes where the number of participants is quickly enlarged after an initial focus on a few elites. In addition, a variety of consultation mechanisms have been developed[36]. In order to achieve more legitimacy, the aim is to move away from elite level decision making and be more inclusive in transitional processes. This discussion has for example been pushed with regards to the representation of women at the peace table (see figure 3, below). In general, it is more difficult to change the rules for participation once a process has started and it will be difficult for new parties to join when key milestones already have been reached. Set on a certain course, a process can develop a 'path dependency'[37]. Also differences in election results for the first and the second constitutional assembly in Nepal had major impact on the federalism debates. In the following, we will discuss aspects that are relevant when it comes to process, with a particular focus on the actors that will most likely participate in federal debates and the possible dynamics among them.

Elite buy-in and broad ownership. In the section on peace negotiations, national dialogue and constitution-making processes we noted several issues in respect to participation, in particular we noted that as far as possible decisions on the future state organization should be taken in inclusive and participatory processes providing for elite buy-in as well as broad ownership. Furthermore, we noted that peace negotiations tend to be more focused on the elite while constitution-making processes and in particular national dialogue processes tend to aim at high levels of inclusiveness and participation, potentially leading to broad ownership of the outcomes. We also noted that elite buy-in and broad ownership can either be achieved by combining different processes or by opening up peace negotiations, involving different tracks and making use of smaller and bigger negotiation tables as well as by providing room for negotiations and consensus-building among political elites in national dialogue and constitution-making processes.

Who advocates? Often, federalism is advocated by territorially concentrated groups who consider themselves disadvantaged, discriminated against or outright marginalized. Examples are for instance Madhesi demands for federalism in Nepal but also of ethnic groups like the Shan, Karen or Kachin in Myanmar. In such cases, federalism tends to have clear majority-minority dynamics with minorities advocating for federalism and claiming victimhood. Sometimes, the majority equally considers itself as victims, e.g. parts of the Burmese ethnic society based on their suffering under the military regime. Arguments based on victimhood tend to make a constructive debate more difficult. The ruling elite of the country is very often more skeptical or even among the opponents of federalism – for a variety

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36 While efforts in the past put more focus on the ex-post ratification and validation of a new political system, some start to emphasize a bottom-up or ex-ante approach to institutional change, putting emphasis on developing institutions and ownership bottom-up. For example, in 2016, the Rift Valley Institute invited several chiefs in South Sudan to build trust and discuss pressing issues that they faced and discuss genuine 'local' ideas about political institutions. Another recent interesting example here is the project leading to a report by Saferworld on 'Forging Jubaland. Community perspectives on federalism, governance and reconciliation'. In this project, the aim was to understand what the local perspectives, needs and wants on state organization were: Saferworld (2016) Forging Jubaland. Community perspectives on federalism, governance and reconciliation. Saferworld (financed by the European Union).

37 See, Humanitarian Dialogue and African Union (2013): Managing Peace Processes. Vol 1. Process related questions. A Handbook for AU Practitioners.

of reasons – or they promote a very different vision of federalism than the main advocating groups. There are however also cases, in which federalism is promoted by the ruling elites as a reaction to a separatist movement in the country. In Yemen, the embrace of federalism in the national dialogue process was a clear rejection of demands for Southern independence. There are also cases in which one political party or movement embraces a federalism agenda in order to expand its attractiveness to different regions and communities. In some cases, all sides agree that federalism is needed – though sometimes their motivations for supporting federalism might differ, for instance because federalism is considered as the second-best option, e.g. to continuing fighting or to secession or because other models failed – or are perceived to have failed. In several cases, federalism was advocated amongst others because decentralization was considered as not having achieved the wanted effects.

High number of stakeholders, high level of heterogeneity. Federalism debates tend to have a high number of different stakeholder groups with changing alliances. It is risky to assume that any of the usual stakeholder groups, e.g. political parties, armed groups, women or men, ethnic groups, are homogeneous in their opinions, including on federalism. At first sight, there are the opponents, proponents and the undecided. These groups can - but need not - overlap with political party membership, regional or group identity. For instance, while officially political parties and their leaders in Nepal had clear positions on federalism, in the end, the *intra*-party differences on federalism were at least as pronounced as *inter*-party differences. The dividing line was primarily between identity groups, e.g. between the dominant group of Khas Aryans and other ethnic groups as well as Madheshi groups in the South. However, also within these groups there were important differences. Khas Aryans from the less developed West of the country tended to be more enthusiastic about federalism than those from other parts of the country. Members of indigenous groups that lived in the original settlement area of the group often pushed stronger for federalism than members from the same group that had migrated to other regions and were in a minority in those regions. The various indigenous groups had differences in respect to identifying federal unit boundaries because of competing demands for territory. On federalism in general, Madhesis and indigenous groups formed alliances though

they disagreed on a number of features, including on the demarcation of federal units. These alliances remained fragile through-out the process. Dalits, a socially strongly disadvantaged and territorially dispersed group remained mainly undecided. Among the opponents and the undecided there can again be major differences in the reasons 'why' someone is opposed, those in favor or undecided might have very different views 'what for' federalism shall be introduced. Stakeholders do not necessarily have the same vision for the country, and in some cases, the vision remains vague. A further impeding factor is that often interests and possible dissents with the leadership are not clearly vocalized even within the own group and therefore not open to reflection.

Perceptions of power balance in the future mobilizes new actors. The introduction of federalism will influence the formal (and potentially informal) power-balance and decision-making procedures of the future. In most cases, it is even an explicit objective to share power, e.g. between the center and the regions by strengthening the regions or different communities within regions. This shift in power might have the effect of empowering some groups and personalities and of limiting the power of others. Furthermore, depending on the federal design, federalism can have negative side-effects on dispersed communities who through federalism might be in a minority at the center as well as in the federal unit. In addition, the demarcation of federal units can create new regional minorities and can lead to competing quests for territory and 'own' federal units. The perception of losing in the process can mobilize formerly non-mobilized groups.

Women. The introduction of federalism has some but limited gender specific impacts. In many conflicts, women have the potential to bridge divides between political parties and identity groups as normally they have some interests in common. However, on contested issues related to federalism, e.g. the demarcation of federal units, women tend to be as divided as men and they are not more likely than men to overcome divisions amongst each other.

Figure 5: Women signatories in Peace Negotiations (1992-2011)

■ Women (4%) ■ Men (96%)
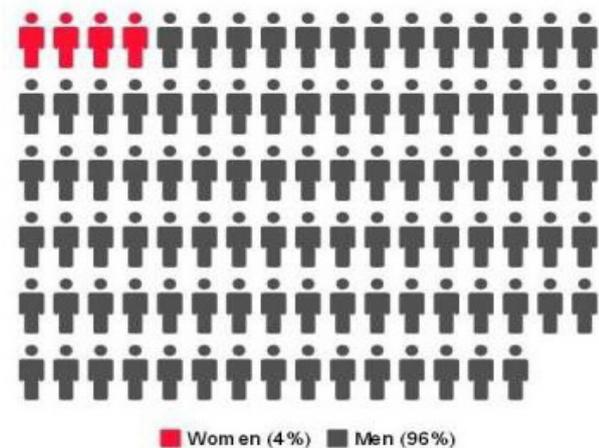
Soure: UN Women (2012)

External actors. In addition to internal actors there tend to be a number of external ones. In many cases, neighboring countries might have a view and influence the debates directly or indirectly. Their positions might impact on whether or what kind of federal options are feasible. There might be groups that settle across state boundaries. Furthermore, there is the possibility that a whole region is influenced by what is sometimes called a 'super power' that might favor one or the other political system. In addition, in particular in developing countries, members of the development community might support the debate, different countries or organizations might offer know-how or good offices. These external supporters also have an impact (positive or negative) on the federalism debates.

Challenges in the selection of participants. It becomes clear that the selection of participants for federalism debates is crucial. On the one hand, this selection depends on the particular constraints that a process imposes (peace, national dialogue or constitution making process) but on the other hand, the selection also takes place in a very difficult context like the high number of stakeholders, the advocates and opponents as well as their heterogeneity, possible new actors, women as well as external actors. To agree on who should decide on participation and how to identify relevant interests is not always obvious. However, as a procedural minimum, the selection criteria for federalism debates have to be transparent.

Questions:
- Who is regarded by whom as the main stakeholder groups? What interests and motivations do they have in relation to federalism? Are there intra-group differences in opinion on federalism? How are the dividing lines on the topic within and among stakeholder groups?
- In what kind of formal and informal fora does the federalism debate take place? Who does participate in the debates? Which stakeholder groups are represented, who is not participating? Are all different interests represented? Are there groups that might be impacted by federalism but that are not at the table? Are the debates mobilizing new groups? Is any of the groups likely to become an opponent of federalism because of the shift in the power-balance? Does any group need special support to allow them to voice their interests and to have a level playing field?
- How transparent is the selection of participants? What are criteria? Who selects?
- How to deal with the multiplicity of stakeholders? In how far is it possible to reduce the challenge by setting-up parallel processes like civil society forums and consultations.
- Who defines which interests/groups shall be represented and who is representative of these interests/groups: is there the possibility to elect, are there accepted authorities to appoint, shall the selection be left to the various stakeholders? Who decides?
- How to deal with hardliner groups: while excluding hardliner groups can make discussion easier, excluding them can pose the risk that they will oppose the outcomes.
- Are there groups/personalities that can bridge divides? Who are they? Are there groups/personalities that can derail the process? Who are they?
- Who else apart from the conflict parties needs to be part of the discussion (maybe through other means than sitting at the table)?
- Is there an asymmetry with regards to the knowledge of the different parties on what federalism means? How can one deal with that asymmetry so that a meaningful debate can take place?

For the external supporter:

- When engaging in supporting federalism debates it is important to assess how inclusive those debates are. For assessing inclusiveness, a close look at the different interests that exist and that are represented is needed. Always cooperating with the same groups and persons can create blind spots in the external supporter's understanding of the federalism debate.

- It is important to carefully assess under what conditions participation and inclusion are valuable and what the most effective ways are to promote inclusive participation so that participation is not just a technical exercise but can impact on the outcomes of the process.

- Who are the partners that support federalism debates within the constitutional process (the UN, regional powers, bilateral donors, governmental and non-governmental organizations)? What does this mean for the perception of the support by different groups?

- Apart from understanding the different actors as well as their positions and interests, it is important to understand one's own role in supporting a debate. Ruling elites might have mixed feelings about any international engagement on federalism; in particular, if those advocating federalism question the elites' notion of the identity of the state or of the nation or if - in the opponents' understanding - one group attempts to use federalism as a stepping-stone to secession, they might perceive international support as jeopardizing state sovereignty. For instance, in Nepal, the international community was at times accused that they were nourishing group demands that weaken national unity and integrity. In Ukraine, federalism was mainly brought up from representatives in Eastern Ukraine. Certain West Ukrainian politicians depicted such demands as secessionist and Russian influenced. In such a context, internationally sponsored interventions on federalism likely cause suspicion by opponents even if these interventions are part of a broader engagement. In some cases, all sides agree that federalism is needed – though their motivations for it might differ. In these cases, support to federalism might be welcome from all sides.

- An important possible negative effect when supporting debates on federalism derives from a possible legitimization or de-legitimization of certain actors, including local partners. External support to the debates on federalism can provide influence to some groups and may weaken others. On the one hand, influence of certain groups can be increased due to the externally available resources, including financing and knowhow, as well as to the proximity to the external actor if that actor is perceived positively or as powerful. On the other hand the association with external actors can also weaken groups, when the external actor is perceived negatively and the group is considered as externally steered. Such issues might be subtle and escape the analysis of external supporters, however this relates to questions like: Who organizes the federalism debate with whom and who finances it? Who gave the mandate to organize a federalism debate?

CHAPTER 7: **ON DYNAMICS OF DEBATES ON SUBSTANCE AND POSSIBILITIES TO MANAGE THEM**

Complex dynamics. Federalism debates will be impacted by the overall relations between actors and by the processes that shape those relations, by actors' interests, by majority – minority power dynamics, intergroup and intragroup conflicts, as well as by the willingness to reform or insist on the status quo or by overall political and security developments. One of the big risks is that federalism debates will end in categorical yes-no debates and lead to polarization between advocates and opponents. Therefore, a look at dynamics as well as and possible approaches to structure and manage federalism debates will be taken.

Why/what for is federalism demanded. Federalism is hardly ever demanded or introduced just as an end in itself but is normally considered as a means to an end. This end, the main reason why federalism is promoted, can be manifold. Interests or motivations to promote federalism often have aspects that are or should be easily acceptable to all sides: e.g. fostering democratization and equitable development throughout the country, devolving powers for more effective governance in line with the economy of scales, or balancing the power between different regions and groups in order to manage diversity. Based on these arguments federalism can be depicted as a win-win strategy. The motivation can however also have angles or aspects that are less acceptable and that parts of the population can experience as threatening: e.g. enhancing the power of a specific territorially concentrated group to the potential detriment of dispersed groups, maximizing control over the group's settlement area at the potential detriment of minorities in that area, promoting group identities at the potential detriment of national identity, enhancing access to natural resources and other revenues for groups in resource rich areas to the potential detriment of other regions, increasing the number of political positions and administrations at the potential detriment of the financial viability of the country, or in the worst case, promoting group self-determination and secession at the potential detriment of national unity and sovereign-

ty. Opponents of federalism often see federalism as a win – lose strategy with their own group or their country as the potential loser.

The use of arguments shape perceptions. In most cases, the federalism debates include different layers and streams of arguments. Arguments will be selectively used depending on the audience. For instance, proponents of federalism will often use win-win terminology and justice arguments when discussing with international community. In negotiations however they might raise radical demands and use retributive arguments for positioning. When talking to their constituencies the positive aspects of federalism for the own group tend to be underlined, which can lead to raised and sometimes unrealistic expectations about the potential benefits of federalism within this constituency. Opponents of federalism sometimes see it in their interest to play to the fears of their constituencies stressing their potential loss of power, risks for regional minorities, looming ethnification of politics or the disintegration of the country. Opponents use the most radical demands of proponents to discredit them and for instance to depict them as disloyal to the country. This can easily lead to heightened fears about the potentially disruptive effect of federalism within the constituency of opponents. Such a dynamic can trigger mounting polarization between different groups. All stakeholders have to cope with inter-group and intra-group dynamics. In particular, those who participate in the negotiations have to convince members of other groups as well as their own group.

Past experiences. How federalism is perceived also depends on past experiences as these experiences shape the mental frame of the debate. For instance, in several of the post-Yugoslav countries, including Macedonia and Kosovo, federalism is perceived in largely negative terms because of the experience of the dissolution of federal Yugoslavia that was preceded by a strong ethnicization of politics. In some of the Balkan countries federalism is still equated with ethnic politics, and approaches that provide rights

to communities are termed as 'federalization'. One example for this is the recent debate in Kosovo about introducing a separate association for predominately Serbian municipalities. Conceptually such an association has nothing to do with federalism, nevertheless in the media it has been termed as risking a 'federalization' of the country. On the other hand, in Nepal in particular in the early phases of the federalism debates, federalism was perceived as something fundamentally positive.

The tip of the iceberg. Already the above shows, that arguments, including statement on motivations, cannot always be taken at face-value. In many cases, proponents and opponents state their positions and target their arguments. It will need a deeper look to identify the often-complex fabric of interests that motivate groups and that are behind arguments. Past experiences additionally have influence. They shape perceptions and influence what kind of arguments can be successful.

Polarization or reconfirmation of the common state. Federalism debates easily lead to polarization between communities when the impression is created that different communities either win or lose depending on whether federalism is introduced or depending on the federal design. On the other hand, federalism debates can also help to build or reconfirm a vision for the state with a power balance that is acceptable to all. Dynamics can shift and change during the debates. Dynamics will strongly depend on the process and the framing of the federalism debate. In addition, there are some topics of discussion that because of the underlying interests tend to be more likely to trigger polarization, e.g. the demarcation of federal units. In particular, for such issues it is key to have a process in place that helps counteracting or overcoming polarizations (on the process and on sensitive substance issues, see below).

Approaches to manage the debate dynamics. As federalism debates tend to be politically and technically challenging it is difficult to conduct federalism debates without appropriate facilitation. Some approaches might help to use the debate on federalism for building a common vision for the country and avoid that the debates lead to or further deepen destructive polarization:

• **Vision influences design.** The reasons why countries have opted for federalism and their vision for the country have influenced the federal design. The "why" and the "what for" matter. Federalism is most likely to have positive effects if its design is geared at addressing the issues at stake (the "why") and is in line with the vision (the "what for"). The variety of organizational options of the federal system is one of its main advantages. Countries can pragmatically develop a federal system that meets their needs and aspirations. The objectives pursued with federalism and the different visions of the state and the nation will lead to different preferences in federal design. For instance, when the nation is defined as a civic nation in which all citizens are considered equal members irrespective of their ethnic identity there will probably be less willingness to demarcate federal units based on the settlement patterns of different ethnic groups. In cases of countries that acknowledge several nations or rely on a concept of a composed nation it is more likely that settlement patterns will be taken into account when defining federal units. Or, groups that pursue federalism as a means for fostering democracy and development will probably promote a different federal design than groups that see federalism mainly as a tool for internal self-determination, to have their identity accommodated within the state. If there are different visions within one state this will also lead to different preferences concerning the federal design. When there are clashes about the identity of the state or the nation or pronounced differences in the objectives pursued with federalism it is likely that some aspects of federal design will turn into contentious issues.

• **Agreement on visions?** In the best-case scenario, a shared understanding of the "why" and the "what for" is achieved. In such a case it will be relatively easy, with adequate technical expertise, to come to an agreement on federalism – or any other kind of reform. However, in many conflict-affected countries it is not possible to come to a shared understanding. Coming to understanding on the visions is often rendered more difficult because the vision ("How is it if it is different"?) and interests ("what is achieved with it"?) are not clearly distinguished. In many cases, it can already be considered a major achievement if groups manage to acknowledge that there are different interests which stakeholders seek to address through federalism and that there are differences in the vision for the country which all have some degree of legitimacy. In such a case, unless

the visions are completely incompatible, a balance can be sought to address the legitimate interests of both groups as far as possible without jeopardizing the vision of either.

- **Visions evolve.** In addition, visions are not static. The process of acknowledging the different interests might already help to bring the visions one step closer to each other. For instance, if one group mainly seeks recognition and political opportunities for their own group and thinks this can only be achieved through secession, the acknowledgment of others that the group's quest for recognition and power has some legitimacy might make them reconsider whether also without secession an improvement of the group's situation is possible. On the other hand, if a group that previously voiced secessionist demands acknowledges that other groups legitimately seek to maintain the unity of the country this can make other groups more flexible in accommodating some group demands.
- **When visions and interests are not acknowledged.** If there is no acknowledgement of different interests there is the risk that stakeholders talk to each other without a real conversation taking place, either the discussion takes place in categorical terms – federalism yes or no, secession yes or no, or the debate and the compromise-offers of one side to others simply misses the point, let's say one group offers powers in the field of education while the others primarily want to see their group accepted as state-building within the country. Rewriting the preamble to name the group might have been a more effective offer. If stakeholders completely negate the legitimacy of the interests of the other, a process of dealing with the conflict is necessary to enhance the chances of coming to a sustainable agreement.
- **Regular reflections on the "why", "what for" and the related "how".** It can be helpful to establish regular reflection rounds, to look at the "why" and the "what for" to give direction to the process, including to experts, to look at the variety of principles and options from that perspective (the "how"), before moving to any kind of decision or formulated proposals (see following graph). In many cases it is helpful after reflecting on the vision, to first reflect and come to an agreement on principles and options instead of immediately drafting detailed provisions, either by having a separate process to discuss on principles (as in South Africa), e.g. in an political negotia-

tions or a national dialogue or by including reflections on the principles in the constitution-making process. In the end it is necessary to check whether the suggested provisions for the peace agreement, the outcome paper of the national dialogue process or the constitution actually correspond to the interests and the evolved vision. The debate has to take loops like in a spiral to always come back to the 'what for'. If possible not too much should be pre-determined in this process. For instance, it might very well be that the process of debate shows that federalism, or federalism alone might not create the needed balance of interests.

Figure 4: Process and Substance
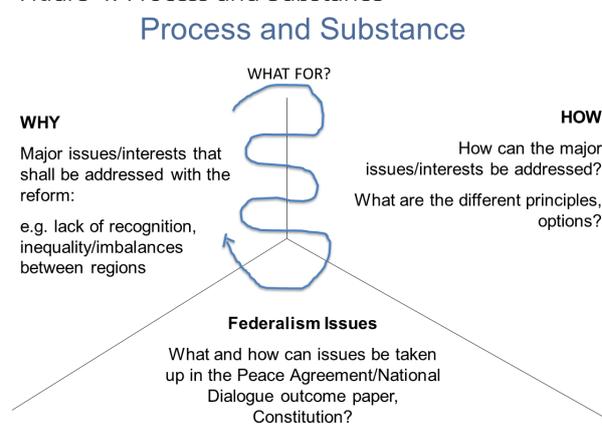
Source: Nicole Töpperwien

- **Room to report, exchange and consult.** Participants to federalism debates also need space to report back to their constituencies to consult them and to engage them. Otherwise there is the risk, the formerly representative participants lose touch with their constituencies and that constituencies do not go through the same evolution of visions as well as do not gain the same understanding of the interests of others.
- **Empowerment.** In most contexts, some stakeholder groups have more knowledge and know-how on federalism as well as access to information than others. Furthermore, some stakeholders will be more powerful and vocal than others. These factors might contribute to an unleveled playing field. Those who feel that they lack information, e.g. information about the variety of options might be more insistent on their views or more inclined to block new suggestions. Sometimes, the powerless also lack access and knowhow. When groups with less political power or access to the discussions feel disadvantaged there is some risk

that these groups resort to extra-political means. However, there are also many examples in which disadvantaged groups have more knowledge on federalism than the powerful dominant group. Stalemates within the discussions are particularly likely, when powerful groups feel a knowledge gap to their disadvantage. In general, it benefits the overall quality and effectiveness of the discussions if there is a level playing field.

- **Moving away from categorical debates.** For those who want to move the debates away from categorical confrontation, they will avoid discussions that invite yes/no debates, for instance whether to introduce federalism, yes or no. In most countries already the term federalism will trigger emotions, from high – often too high - expectations about the benefits to justified and unjustified fears and resistance. Federalism is seen as a means instead of as a process. Categorical debates on federalism, in which federalism is depicted either as the miracle cure or as a death-bringing disease, widen the gap in perceptions. It can be more helpful, to explore the different aspects and approaches and name the system later or completely refrain from naming it. Not only the discussion on whether to introduce federalism easily turns into categorical debate, also debates on different concepts of federalism can have such effects. For instance, a debate on whether to introduce competitive or cooperative federalism is only of limited use. It can be more effective to look at various competitive and cooperative aspects, their effects and the variety of ways of combining these elements, as most real life systems might lean closer to one or the other type but normally have aspects of both. Furthermore, there can also be changes over time. Switzerland for instance, enhanced the cooperative aspects over time. Thus a reframing of the debate away from categorical to more distributive debates can be useful.

- **Avoiding contentious labels, e.g. naming the country.** In order to avoid fights on concepts or on specific words/label, there can sometimes be a third way out. The naming of the country shall serve as an example. The name of the country/entity sometimes indicates its organizational form, e.g. Federal Republic of Germany. However, very often, the name is much more a political than a technical decision and does not always correspond to the actual form of organization. For instance, South Africa did not include the term federal though probably a majority of scholars argues that

technically speaking, South Africa can be characterised as a federation. Switzerland's official name is Swiss Confederation ('confoederatio helvetica') though since 1848 Switzerland is federal in nature. Its constitution even has the paradox designation "Federal Constitution of the Swiss Confederation". Quite a number of countries/organizations opted for the relatively neutral terms of 'union' or 'united': The Union of Serbia and Montenegro, the United States of America, the United Arab Emirates, the Union of India, the European Union. The name will influence the mind frame of the debate.

- **Acknowledging fears and hopes.** Federalism debates are often accompanied by strong hopes and fears. Both of them merit to be acknowledged and can be very helpful to clarify the interests behind positions. The hopes show expectations that people have for positive change. In order to avoid frustrations later on it might need a reflection whether or in how far federalism can fulfill these expectations (expectation management). Fears are an important warning signal. They can point out emerging new imbalances in power that have to be counterbalanced, misconceptions, or also shifts in power that are deemed as threatening. Working on fears can help improve the discussed options, mitigate polarization and prevent spoiler behavior. Not dealing with emotions in a process would leave out an important factor for change.

- **Working on misconceptions.** Sometimes negative connotations of the term 'federalism' and difficulties in coming to agreement are due to misconceptions about federalism. For instance, self-determination is sometimes regarded as part of federalism and self-determination is equaled with a right to secession. At least based on international law there is hardly ever a right to secession irrespective whether the country is organized as a federation (see below). A further frequent misconception concerns the powers of the federal units. The impression is created that federal units are like sovereign countries and can for instance limit the access to their territory or impose duties on goods. Almost all federations however guarantee the freedom of movement for persons and goods. In such a case, blocking access would be illegal irrespective of federalism. Working on misconceptions by highlighting comparative examples and rationalizing the debate as well as public awareness building on these issues can help.

- **A variety of ways for balancing interests.** In all cases, but particularly when the federalism debate

is taking place in conflict affected or fragile context it will need a balancing of interests. For instance, groups that advocate for federalism based on an experience of marginalization tend to demand the "4 Rs":

- Recognition
- Representation (political representation as well as representative state institutions, including the administration, police and army)
- Rights (including the right to a degree of self-rule) and
- Resources.

Recognition is mainly a symbolic act, for instance the recognition of the group in the preamble or in another part of the Constitution, the recognition of the group's culture, religion or language. Such recognition does not necessarily translate into rights but acknowledges the group and their identity and can be an important factor for forming a shared identity contributing to nation-building. Though mainly a symbolic act, in many cases the dominant group is reluctant to provide such recognition, in particular when it runs counter to their understanding of the state and the nation, either because they consider the state as their nation-state or because they rely on a civic nation-concept in which identity should not play a role. If recognition is not provided it is likely that demands in other fields increase, for instance that the group demands more extensive decision-making powers or a bigger share of resources. Sometimes the demand for recognition remains unspoken but a lack of offer of recognition still leads to rising demands in other fields. There can be different responses to group demands. There is always more than one way to address the specific interests of any group. Of course it also needs balancing of the interest of different groups, e.g. the interest for self-rule of one group and the interest for the unity of the country of others. Many federations, including Nepal, point out that federalism and the unity of the country have to go hand in hand. Also the dominant group might seek reassurance through recognition. For instance, in Macedonia, there was once an expert proposal to recognize Macedonian as sole national language and to confer to both Macedonian and Albanian the status of official language in order to make the official status of the Albanian language more acceptable to the Macedonian majority. For different approaches that can be used to complement federalism for additional group accommodation, see above Chapter 1.

- **Compromises across topics.** In almost all cases, balancing interests will require compromises across topics. For instance, to come to an agreement on federal unit boundaries it might be necessary to also have guarantees of freedom of movement in the rights section or of representation of minorities in the section on the organization of federal units. Combining issues can help to create a balance. Not all of these issues might be related to federalism.

- **Adding or reducing complexity.** Sometimes a balance can be achieved by adding complexity. For instance, it might be more difficult to decide who is in charge of education than to decide who is in charge of higher, secondary and primary education, who sets standards, defines the curriculum, provides the infrastructure or selects and pays for the teachers. In other cases, reducing complexity might be the more promising approach. For instance, by agreeing on principles that can be translated into provisions later or processes that might help to resolve the issue.

- **Sequencing.** Furthermore, it might be useful to carefully reflect on the sequencing of the debate. Starting with the most difficult issue in isolation might jeopardize the process. It is more opportune to start with an issue that tends to be easier to resolve. For instance, agreement on the distribution of powers among tiers of government might be easier to reach than the demarcation of federal unit boundaries.

- **Political and technical, making use of distinct roles.** Debates on federalism are highly political but there can also be long stretches of very technical debates. Different actors tend to be at the forefront during political and technical debates. The technical debates are likely to be more expert-driven or involve mid-level political cadres with specific expertise. Experts should be at the service of the political process. They have to find those options that meet the 'why' and the 'what for'. If there is no clear agreement on political direction it is difficult for them to do their job. If the technical debate is delinked from the political one there is the risk that the proposals do not correspond to the politicians' expectations or are not able to address the issues at stake.

Consequences for process design. Process design must allow for debating on visions and balancing of

interests. Thus, irrespective of what process design is chosen, whether federalism debates take place in the framework of peace negotiations, national dialogue processes or constitution-making, whether constitution-drafting is conferred to an expert committee or to a constituent assembly – there must be platforms that allow for an inclusive high-level debate that is representative of all the main interests in order to reflect on the vision, to acknowledge the differences in interests and to assess different options, as well as a sequencing and a structure that allows for cross-topic debates, not only limited to federalism in the narrow sense, as well as for adding or reducing complexity depending on the dynamics of the debate.

Questions:
- Who is responsible for the overall process of structuring and managing the federalism debate? What are the different tools and instruments available within the process to lessen pro/con debates on and support a content-oriented exchange on federalism?
- Does the process allow to build a common vision or for gaining understanding of the different visions and interests? Are these visions and interests acknowledged? What kind of platforms could be used to build, express, and acknowledge visions and interests?
- Do all stakeholder groups share a similar understanding of federalism? If not, what are the differences? Has it positive, negative or neutral connotations? Is there a local term that is used? Does it have positive, negative or neutral connotations?
- What are the fears and hopes that stakeholders have about federalism? What do these tell us about their visions and perceptions? Is there a need for expectation management, other corrective measures in order to avoid polarization?
- What are major contentious issues in the process? What are the underlying interests of different stakeholders? What approaches seem viable: e.g. acknowledging visions and interests, calling on experts to clarify visions, calling on experts to explore options, avoiding contentious terminology, seeking cross-topic compromises, adding or reducing complexity, public outreach, sequencing (leaving the contentious issue for later)?

For the external supporter
- Responsible supporters consider all potential issues and processes that can impact on the federalism debates and aim at gaining full understanding of the context, the main stakeholders, their visions and interests as well as perceptions and dynamics in order to decide whether and how to support.
- Perceptions on federalism will change over time. There will always be a multitude of subjective points or views. Therefore, it will need monitoring of the debates and regular assessments.
- Federalism debates risk leading to a polarization within the country and among communities. External supporters can help avoid such polarization for instance by avoiding categorical either/or debates, by encouraging stakeholders to explore and acknowledge visions and interests – their own as well as those of others, by clarifying concepts on misconceptions.
- The analysis of visions and interests is also important for external supporters of federalism debates because it will inform what kind of support can be useful. If the assessment shows a lack of vision or divergent visions, depending on the context, support to separate or joined visioning processes can be useful.
- A clear understanding of the vision or visions can also allow assessing whether or what kind of federalism can actually help achieve the vision and thus is a pre-requisite for scrutinizing different proposals that are on the table. A good understanding of different interests – and not just of positions – allows identifying common ground. It is also key for predicting reactions to different proposals.
- External supporters have to be aware that issues can be sensitive. They should provide some space that stakeholders can vent their hopes and fears. This will also make technical debates afterwards more fruitful and to the point.
- In many cases, external supporters want to contribute to empowering different groups. It is important to realize that politically disadvantaged does not always also mean disadvantaged in respect to knowledge on federalism. In many cases, it might be worthwhile to work with the dominant group that might have less knowledge and might feel less inclined towards federalism. In other cases, it might be useful to support disadvantaged groups in being heard in the process. In all cases it is important to scrutinize the own Theory of Change and to care-

fully watch how support is perceived by the different stakeholders, to be transparent and clear in communication.

- External supporters should try to contribute to social learning processes that instead of win-win or win-lose categories aim at coming to a shared understanding of a positive future and that help to cope with aspects that some groups might consider as negative.

- External supporters should make sure that they are fully aware about the different connotations of the term 'federalism' as well as other concepts in the specific context. Also visiting experts should be briefed so that he or she can phrase interventions in acceptable terms. Different approaches are possible:

- *Avoiding the term altogether*: Often it will be more productive to orient the debate back towards the reasons why federalism is promoted and different options for addressing these reasons as well as to discuss about the underlying concepts without using the term. This can also help to circumvent a categorical debate: federalism yes or no.

- *Encouraging a rational reflection on the meaning of terms and concepts:* In several countries, including Nepal and Sri Lanka, a glossary was established in order to reflect on the technical meaning of different terms and concepts. Also an expert would have to explain how he or she uses the terms in order to avoid misunderstandings.

- *Work on misconceptions:* It can be useful to openly discuss misconceptions of federalism. Critical reflections on opportunities and risks further increase credibility. This is also an important part of expectation management.

- *Be clear about the own messages:* If the term 'federalism' has very differing connotations for different communities this is also a sign that the outside supporter has to carefully reflect on own messages – in order to bridge the gap instead of widening it. Transparent messaging towards all groups can increase credibility as well as being aware of and clear about the own subjectivity.

- External supporters are often asked to provide input to debates on substance - on the federal design that shall be adopted. In most cases it is more appropriate to provide different stakeholders with time to explore different options and be cautious about 'giving answers', to provide input in a process sensitive way and keep the overall process in which the federalism

debates are taking place in mind. It is important to note that the same institutional design does not always produce the same results when inserted into different social structures and cultures. While all political actors and citizens are equally capable of taking decisions, they do so in their respective historical contexts, with different memories of the past, dilemmas of the present and hopes for the future.

PART III: **ON THE SUBSTANCE OF FEDERALISM DEBATES**

Coming to an agreement on the federal design. Irrespective of the setting, whether during peace negotiations, a national dialogue or a constitution-making process, at one moment in time different stakeholders have to discuss on different federal options and take decisions. There are as many different federal designs as there are federations. Federalism as "constitutionally guaranteed self-rule and shared rule" can take many forms. In a federation, federal units are attributed with powers and resources to decide on certain issues by themselves and to implement the decisions they have taken (self-rule) as well as to participate in central decision-making, e.g. through representation in a second chamber of parliament (shared rule). In order to create stability and transparency as well as to avoid one-sided changes, the existence of the federal units, self-rule and shared rule are guaranteed in the constitution. All federal countries developed unique institutions. They got inspiration from other countries, e.g. Switzerland from the United States of America, however in the end every country came up with its own interpretation of federalism, based on past experiences, traditions and needs. There are some that introduced federalism to manage cultural diversity, e.g. Switzerland and to some extent Nepal and others where diversity management was of less importance, e.g. Austria. Some have federal units that were drawn based on the settlement patterns of the main communities, e.g. Bosnia Herzegovina and others that paid less or no attention to community preferences. Others again went for mixed approaches, e.g. India accommodated linguistic diversity through the creation of new federal units however did not want to accommodate religious diversity in a similar way. Nepal opted for primarily creating units with mixed, heterogeneous populations. Some of the federations mainly focus on self-rule, e.g. the United States of America while others, for instance Germany, stress cooperation. There are huge variations in the extent of non-centralization between federations or in the extent of the center's control and intervention possibilities in respect to the federal units. Furthermore, the system of government is not dependent on federalism. There are federal countries that are organized as parliamentary systems, e.g. Canada, Austria, Nepal, and others that adopted a presidential system, e.g. United States of America or Brazil. Also many other issues that are normally included in the Constitution, like for instance the choice of official languages are not directly related to federalism.

Issues that normally are at the focus of federalism debates. In the following not all issues of federal design will be looked at but mainly those issues that tend to be at the focus of federalism debates, either because they tend to turn into contentious issues or because of the technical challenges they encompass. Issues that will be further looked at are:

- One of the most challenging issues tends to be the decision on the demarcation of federal units. On what basis shall federal unit boundaries be drawn? How many federal units shall there be? What are approaches that can help to overcome polarization and come to an agreement on demarcation: Chapter 8: How to demarcate federal units?
- The distribution of powers and resources is technically challenging however in particular also the allocation of public finances can be contentious. What are ways to note the distribution of powers in the constitution? What are criteria that can be used to decide which level of government shall be in charge of different policy fields? How to match powers and resources? What are ways to share revenue? What has to be considered in respect to natural resources: Chapter 9: How to distribute powers and resources?
- The second chamber of parliament is of importance for shared rule. Nevertheless, it sometimes receives less attention in federalism debates though there are a variety of options how to organize the second chamber with important impact on the overall functioning of the federation. Chapter 10: What to consider in establishing a second chamber of parliament?
- In many cases federalism is advocated by ethnic groups. In such cases, it is likely that different features will be discussed that aim at accommodate ethnic groups, e.g. demarcation of federal units based on settlement

patterns, or the composition of the second chamber of parliament. However, when such features lead to an ethnicization of politics it can also be dangerous: Chapter 11: How much importance shall federalism give to ethnic diversity?

- In many federal debates, the question arises whether federal units shall have their own constitution. This debate can become heated as there seems to be only an either-or. Therefore, it is useful to explore comparative experiences and also to explore avenues that can reframe the debate. Chapter 12: Shall federal units have their own Constitution?

- Also, the right to self-determination often comes up in federalism debates and causes controversy. In order to reshape the debate, the content of the right to self-determination is explored and the relation between federalism and the right to self-determination scrutinized: Chapter 13: Do federal units have a right to self-determination?

- There are not only successful federations. Unfortunately, a number of federations disintegrated. These federations also provide some lessons that are useful when debating and deciding about federalism: Chapter 14: When do federations fail?

- In many cases, federalism shall shift power from the center to federal units. Federations differ in the amount of power they allocate to federal units. Not only the distribution of powers provides information of how centralized a federation is also other aspects of federal design matter: Chapter 15: What aspects of federal design determine how centralized or non-centralized a federation is?

CHAPTER 8: **HOW TO DEMARCATE FEDERAL UNITS?**

Potentially controversial. In any debate about introducing federalism, the question of the number and demarcation of federal units tends to be among the most controversial. The demarcation of federal units in the end determines who will form the populace of the federal unit and, with it, who benefits most directly from self-rule and shared rule. Put differently, the demarcation of federal units determines who has the best chances of gaining the necessary majorities for filling political positions within the federal unit. The demarcation of federal units has important impact on the overall power balance within the state.

Demarcation brings vision and different interests to the surface. Debates on the demarcation of federal units can bring different interests and diverging visions about the country into the limelight. The vision and interests will have impact on the criteria proposed and used for the demarcation of federal units and in the end on the number of federal units. For instance, if federalism shall be used for enhancing efficiency and effectiveness of service-delivery, the main focus might be on the capacity of federal units. In most cases, capacity criteria will lead to a limited number of federal units as smaller federal units might not be able to assume complex powers, e.g. higher level education or specialized health care. If federalism shall be used to foster the integration of different regions and groups, criteria like pre-existing regional identities and settlement patterns of groups might be at the forefront. Politically mobilized regions and groups tend to demand 'their own federal unit'. The presence of many politically mobilized groups within the country can translate into a demand for many federal units. A high number of small federal units however might be considered as too costly (costs for separate administrations and political bodies). If there are strong regional identities or if there are two or three major ethnic groups, there can be demands for a low number of federal units. A sizable region or group might demand to form one federal unit. Such a region or group might resist against being divided into different federal units, in particular if there have been previous experiences/perceptions of marginalization. The creation of several federal units within the region or area of settlement can be perceived as diluting their influence and identity, as for instance debates in Sri Lanka have demonstrated.

International law only provides limited guidance. In principle countries are free to organize themselves. International law provides very limited guidance on how to demarcate federal units. International documents assume that the units of subnational government (federal units) already exist and are accepted. Provisions mainly concern the change of subnational boundaries. For instance, the *European Charter of Local Self-government* includes one provision for changing boundaries. According to this provision "changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of referendum where this is permitted by statute[38]." Though this provision is formulated in a very open way, it points to the need for some democratic backing of boundary changes or in different words for mechanisms that ensure that the wishes of the population are considered when defining boundaries. Some provisions in international documents deal with boundaries of electoral constituencies. The issues concerning subnational boundaries and electoral boundaries differ to some extent. However, in many cases, federal units also serve as electoral constituencies so that federal unit boundaries are identical with electoral boundaries. It would seem justified that some provisions concerning electoral boundaries can also serve as reference for the setting of subnational boundaries. For instance, the *Framework Convention for the Protection of National Minorities* of 1994 in its Art. 16 expressly prohibits any alterations of boundaries for the purpose of diluting or

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38 European Charter of Local Self-government of October 15, 1985, Art. 5.

excluding minority representation[39]. When demarcating electoral constituencies, minority/group/regional interests have to be taken into account. International law, whether binding or not, can function as a reference but leaves a broad scope of organizational freedom to each country. Amongst others it gives only limited answers on the criteria to use and the number of federal units to create. It much more suggests certain standards for the process of agreeing on the demarcation of federal units. As far as possible these processes shall be participatory in order to be able to consider different interests and shall include a mechanism to ensure the democratic legitimacy of the demarcation, e.g. through a referendum or other democratic procedures (including the procedure to adopt a constitution).

Lessons from comparative experience for defining criteria and numbers. Lessons from international experience provide only limited guidance on what criteria to use of the demarcation of federal units and how many federal units should be created.

- **A variety of criteria used.** Countries used a variety of criteria for defining federal unit boundaries. In federations that came into existence by aggregation the pre-existing units turned into federal units. This does not exclude that boundaries were amended later on as e.g. in Germany. Other countries used a variety of criteria, including capacity, already existing administrative structures, geography, population numbers, resources, history, and identity. Some constitutions provide procedures for changing federal unit boundaries, e.g. Switzerland, India, or Ethiopia, instead of using predetermined criteria.

- **The use of criteria for the demarcation.** Even if there is an agreement on the criteria, e.g. on the use of criteria related to capacity and the economy of scales, this will still not automatically lead to universally accepted demarcations. For instance, based on the economies of scale, different services would suggest different sizes or demarcations of federal units, e.g. the ideal size and demarcation for providing high level health care, for offering education or for ensuring peace and security do not necessarily match. Also if settlement patterns

of communities are taken as the core criteria for the demarcation, more often than not there will be competing claims to territory as normally there are also areas with mixed populations. Even if there is agreement on criteria, demarcation of federal units will never be a purely technical task as there will always be different possibilities to demarcate based on the same criteria. Experts alone cannot determine the demarcation, it needs a political process that is deemed as legitimate by the different stakeholders.

- **Huge variation in numbers.** The number of federal units in federations varies greatly, between 2 (Bosnia and Herzegovina) and 81 (Russia). Of course, federations also differ in size geographically and population-wise, however these differences alone cannot account for the differences in numbers. Switzerland with a population of around 8 million people has 26 federal units while Nepal with its population of 31 million opted for 7 federal units. There is no general rule about the ideal number of federal units. In the end, almost any number and demarcation is appropriate that is acceptable to the population as such as well as the majority and the minorities.

Some red lines. However, there is a general rule of thumb that problems can arise if there are only two or three federal units or if one federal unit encompasses more than 50% of the population. This rule of thumb was developed based on experiences of failed federations, including Czechoslovakia, Serbia and Montenegro, Senegambia and Sudan (Sudan – South-Sudan).

- **Two or three federal units only.** Currently, there are two existing federations with only two federal units: Bosnia and Herzegovina and St. Kitts and Nevis. Many regard Bosnia and Herzegovina as a very fragile and not very functional federation, mainly sustained through the involvement of the international community. St. Kitts and Nevis is a micro federation and currently debating to dissolve. The federal units of the Comoros are three islands and the country is classified by Ronald Watts as a quasi-federation, as it has some hybrid elements[40]. In addition, also Comoros is fragile. As Watts notes "Despite the aim (…) to achieve unity with a measure of autonomy for

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39 Similarly the *Lund Recommendations* mention in the explanatory part in comment 10 that "In drawing the boundaries of electoral districts, the concerns and interests of national minorities should be taken into account with a view to assuring their representation in decision-making bodies (…)".

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40 Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed. Montreal: McGill-Queen's University Press, p. 54.

each island, the federation has been marked by secessionist movements, several violent military coups and general instability[41]".

- **A federal unit with more than 50% of the population.** "A particular source of tension has existed in those federations where a single unit has contained over half the federation's population, almost invariably a source of instability[42]". This category of federations with a federal unit encompassing more than 50% of the population, amongst others includes again all federations with two federal units. In the case of two federal units, one of the federal units tends to be bigger, thus encompassing more than 50% of the population. There are a significant number of examples in which the dominance of one federal unit created serious tensions, including Jamaica (West Indies Federation), East Pakistan before the secession, Russia within the USSR, Czech Republic within Czechoslovakia, Serbia within Serbia and Montenegro, St. Kitts within St. Kitts and Nevis, the Bosnia-Croat Federation within Bosnia and Herzegovina, Chuuk within Micronesia.

What is the challenge? There are some arguments, why federations composed of two or three federal units as well as federations with a federal unit that encompasses over 50% of the overall population tend to face challenges. These arguments mainly concern the power balance and its influence on the governance processes.

- **Positive consensus difficult to achieve.** Political institutions within the federations are supposed to balance the overall interests of the country with the interests of the different federal units. As Ronald Watts puts it "the ability of federal institutions to generate some sense of positive consensus is vital to their continued operation[43]". In federations with very few federal units or with enormous disbalances in population, the institutions at the center are often not able to generate such a positive consensus but more often than not governance processes lead to the alienation of one of the federal units – which over time might question the continuance of the federation.

41 Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed, Montreal: McGill-Queen's University Press, p. 54.

42 Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed, Montreal: McGill-Queen's University Press, p. 126.

43 Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed, Montreal: McGill-Queen's University Press, p. 181.

- **Balance of power.** The main challenge is related to the shared rule principle. Based on the shared rule principle, institutions at the center shall ensure that the interests of the federal units are taken into account in central decision-making. In federations with very few federal units this can lead to unwanted effects. Normally shared rule is guaranteed through a bicameral parliament. One chamber of parliament represents the people in general (1st chamber), the other the different federal units (2nd chamber). In particular, decisions that are vital for the federal units should be passed by both chambers of parliament. In cases of a federation with two federal units, one federal unit will encompass more than 50% of the population and therefore will most likely have a majority within the 1st chamber, in particular if political parties have primarily a regional basis. If Members of Parliament who are coming from the federal unit feel concerned, they can block decisions through the decision-making in the 1st chamber. In the 2nd chamber, the federal unit either also has a majority (based on weighted representation) which in effect renders the representation of the other federal unit ineffective, creating frustration within this federal unit, or it has an equal number of seats like the other federal unit which can create stalemates within the 2nd chamber. If the more populous federal unit has a minority within the 2nd chamber or the other federal unit might have a veto power in case of vital decisions, stalemates can emerge between the 1st and the 2nd chamber of parliament. In all cases, there is the risk that decision-making turns into perennial negotiations between the federal units, always one threatening to block the other.
  - In the case of federations with two federal units, the shared rule principle can contribute to negative dynamics, either leading to continuous stalemates turning the federation dysfunctional or leading to the alienation of the bigger or the smaller federal unit depending on who is more likely to be overruled. The self-rule principle provided the federal units already with own political institutions and experiences of own decision-making powers. If the federation is not seen as effective or as safeguarding the own interests, temptations might arise to question the continued existence of the federation.
  - In the case of three federal units, the dynamics will slightly change as – depending on population sizes - one federal unit does not necessar-

ily have a majority in the 1st chamber. Risks of confrontational politics within the 2nd chamber however remain. Politics easily turn into two federal units opposing the other one.

▪ In federations with more federal units the dynamics are different because in the 1st as well as in the 2nd chamber coalitions between federal units can change depending on the issues at stake. Through changing coalitions and majorities strong juxtaposition can be avoided.

• **How to address the challenge?** In particular, if there are strong demands for arrangements with a very low number of federal units or arrangements with one federal unit encompassing more than 50% of the population, the question will arise how to proceed in order to avoid potential negative effects.

▪ One option is to consider a different kind of organization, e.g. to opt for an autonomy arrangement or for the creation of a federacy instead of full-fletched federation. (No matter what kind of system is selected, it is still possible – for political reasons – to name the system as federal).

▪ Other options include trying to arrive at a shared rule arrangement that does neither lead to stalemates nor to frustrations of one federal unit, e.g. by enlarging the representation in the 2nd chamber to others next to the federal units, or to promote national umbrella parties instead of regional parties. The risk remains that one federal unit – or political party – will see such arrangements as the attempt to limit its political influence.

▪ The third alternative is to aim for a higher number of federal units but to allow for instance that different federal units cooperate with each other (see also below). But this approach is not necessarily easy to accept for all involved either. The overall system will have to provide for a power-balance.

Process options for demarcating federal units. In particular, because the demarcation of federal units carries a high risk of turning controversial, a process that all major stakeholders consider legitimate is of utmost importance.

• **Building on and adjusting what already exists.** Depending on the context, it can be a promising approach to elevate already existing administrative units to federal units (e.g. planning or development regions) and to provide for possibilities

to adjust their boundaries on a case by case basis, e.g. through democratic procedures. For instance, the Swiss constitution provides for a process to adjust federal unit boundaries through series of popular votes that allow to determine the boundaries in line with the wishes of the concerned population and the assent of the overall population. Building on existing units and adjusting them if needed has the advantage that the approach is principled and transparent. However, this approach will not always be feasible, either because there are no pre-existing units of adequate size that can be used or such units are so contested that using them as a basis is considered as out of the question. When there are only smaller units, e.g. local governments or districts, an option can be to form federal units by amalgamating or combining these pre-existing units. For instance, in Iraq governorates can jointly form federal units[44]. In Nepal, in the 2015 constitution, with minor exceptions, federal units are formed based on the pre-existing districts.

• **Drawing federal units from scratch.** The process of demarcating federal units is particularly challenging if federal units have to be demarcated from scratch. Purely democratic procedures, in which the concerned populations decide on boundary lines in referenda are difficult to realize because of the multitude of potential options. It will need an initial map to work with. If possible such an initial map should be drawn based on a pre-understanding of demarcation principles among stakeholders. Principles should be more concrete than just criteria. While criteria might say that federal units are demarcated based on capacity and identity, the agreement on principles provides guarantees that interests of the different stakeholders are safeguarded, e.g. one could imagine principles guaranteeing that a specific community will not be divided or will be divid-

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44 A new region (federal unit) can be proposed by one third or more of the council members in each affected governorate plus 500 voters or by one tenth or more voters in each affected governorate. A referendum must then be held within three months, which requires a simple majority in favor to pass. If there are competing proposals, the multiple proposals are put to a ballot and the proposal with the most supporters is put to the referendum. In the event of an affirmative referendum a Transitional Legislative Assembly is elected for one year that has the task of writing a constitution for the Region, which is then put to a referendum requiring a simple majority to pass. Governorates that are unwilling or unable to join a region enjoy some autonomy and resources according to the principle of administrative decentralization.

ed into not more than two or three federal units, that all federal units will have access to the sea, or whatever other aspects are relevant to the stakeholders. Based on these principles/safeguards, experts can draw a map that can be refined through popular consultations and further negotiations and/or referenda.

- **Provisional federal units.** Some countries, e.g. South Africa, used a provisional map to get the federalization process going with the clear outlook that this map will be revised in the future. This can take some emotions out of the debate and most of all it can help prevent that the whole process collapses because of disagreement on federal unit boundaries. It requires however a minimal level of trust of key stakeholders that such a revision will really take place. Furthermore, it creates challenges for institution-building as it is likely that revisions will require adaptation of the institutions at the level of federal units.
- **Postponing decisions and/or leaving them to an expert commission.** Other countries left the decision for later. For instance, Iraq adopted the Constitution without a demarcation – but provided for a process to form federal units (see also above). Also Nepal initially considered promulgating the Constitution without a 'federal map' and to leave the demarcation to a commission. However, proponents of federalism depicted this move as the attempt to postpone federalism per se. Furthermore, the Supreme Court had voiced concerns because the Interim Constitution had mandated the Constituent Assembly to determine the boundaries of federal units.

The question of non-territorial federal units. Most federal countries use territorial federal units. However, it is also possible to provide the right to self-rule and shared rule directly to communities (personal federalism). Belgium created something close to personal federalism by providing powers to communities. In addition, there are some interesting examples from non-federal countries: Several countries know group rights or personal laws, limiting the jurisdiction of these rights/laws to the persons belonging to specific communities (in the case of personal laws, it is normally left to religious communities to define laws for their group, e.g. the right of marriage). Some countries provide a secular alternative to personal laws or in different words a possibility for the individual to opt out of the law of his or her community in favour of national laws.

In some cases, there are own institutions, e.g. own courts to enforce the personal law. New Zealand created personal features for a different purpose: Maoris (the indigenous population) can either vote in one of the ordinary election districts or in a non-territorial constituency for Maoris. This provides two benefits: on the one hand it ensures the representation of Maoris in political institutions (parliament), in addition it can help to identify legitimate representatives from the group. As a drawback: it encourages politics on an ethnic basis and might discourage political parties to nominate Maoris in ordinary election districts.

The purpose of a non-territorial federal unit and its impact. To identify a list of powers for non-territorial federal units it very much depends on why/with what purpose the non-territorial unit is created: shall it provide the group with the possibility of self-rule in the sense of separate political institutions, separate schools, separate legislation? In this case, powers can be similar as for other (territorial) federal units, however, practicality might put certain limits. For instance, police power is probably almost impossible to organise in a non-territorial federal unit, in particular when communities are dispersed; it would also need special rules in case incidents and crimes involve persons from different communities. Schools can only be organised in areas with high enough population numbers from the group. In addition, human rights might impose further limits: it is questionable whether for instance hospitals should only treat persons from a specific group. In addition, it will be necessary to regulate whether citizens from the specific community should have a choice, e.g. between the school run by the non-territorial unit (the own community) or by the territorial unit in which they live, whether citizens from the specific community can only make use of their political rights in the non-territorial unit or also in the territorial unit or have to decide to which they want to belong. The list of powers will be different if the purpose is not 'separate institutions' but much more aims at integration and inclusion. For instance, Dalits in Nepal, a highly marginalized and dispersed group, raised the issue of a non-territorial federal unit. Most Dalits preferred integration, e.g. affirmative action to have more Dalits in higher education instead of separate schools for Dalits. In the end, the idea of a non-territorial unit was discarded because it was regarded as more opportune to provide enforceable rights instead of pow-

ers. Such special rights could for instance include to have a say on the school curriculum, to have reduced school fees or special scholarships, to have free of charge health services, or to have a special ombudsperson. A non-territorial federal unit for dispersed communities can however make sense when it is used mainly for representation issues, similar to the above mentioned case of New Zealand and the special election constituency for Maoris. This can provide the centre and the federal units with a legitimate, elected, counterpart from the community.

Federal units in waiting. There are some federations with different types of constituent units. Quite a number of federations distinguish between federal units and centrally administered territories. Such territories can have substantial own powers and might become federal units at one point in time (see e.g. Venezuela, the debate in Canada, Australia).

- The major difference between a Canadian province and a territory is that provinces receive their power and authority directly from the 1867 Constitution Act (as required for federations) while territories derive their mandates and powers from the federal government (as decentralized units). Canada has three territories. The three territories form the most sparsely populated area in Canada with a total of about 100,000 people. They are often referred to as a single region, The North. In late 2004, Prime Minister Paul Martin surprised some observers by expressing his personal support for all three territories gaining provincial status sometime in the future, acknowledging their importance for the country as a whole as well as because of potential new development prospects: global warming could make this region in the Arctic more open to exploitation.
- Australia has states and territories. When the federation was formed by the six states in 1901, the land within the Northern Territory was governed by the state of South Australia and the Australian Capital Territory did not yet exist. The territories are not equal partners in the federation. Territories have only two representatives in the Upper House (Senate) whereupon States have six representatives. While State senators are elected for six years, senators from territories are elected for three years. Powers for self-rule are however similar. The Northern Territory wants to move towards the status of federal unit which however necessitates constitutional amendments.

- Originally in Spain and still in Iraq, the units can decide at what point in time they want to become a federal unit. In Iraq, under the Federalism Law, a region can be created out of one or more already existing governorates or two or more existing regions. A governorate can also join an existing region to create a new region. There is no limit to the number of governorates that can form a region, unlike it had been provided for in the Transitional Administrative Law of the Iraqi Interim Government that had limited it to three.
- Russia has probably the most complex federal structure. Republics are areas with substantial non-Russian communities. Regions and territories are non-ethnic and have less autonomy than republics. The autonomous areas are the homelands of Russia's indigenous aboriginal, populations. They are at the same time separate constituent units and part of a region or territory (which led to many jurisdictional disputes).

How to soften the question of boundaries? How to lower the stakes? The issue of demarcating federal unit boundaries is often highly contentious. It can need some creativity to lower the stakes in order to limit the confrontation between groups. There are some issues that might make it easier to accept the demarcation of federal units even if the outcome does not exactly coincide with the wishes, e.g.:

- Possibilities to change the boundaries in the future might reassure people that if they are really very unhappy with the federal units they can change the boundaries, merge federal units or divide federal units with democratic procedures. Democratic procedures give the people the power to decide. In some cases, it is easier for the politicians to agree on a procedure than to agree on the specific boundaries. The procedure can be shaped so that it ensures a balancing of interests.
- Possibilities for federal units to cooperate with other federal units within their region, e.g. for service delivery, for schooling might reassure people that they can maintain and promote their own identity even if the region is divided into several federal units or that the economy of scales can be optimized on a case by case basis. For instance, the region of Jura in Switzerland is part of two cantons. They have very strong cooperation, including own democratically elected institutions (Interjurassian Assembly). It can be envisaged

that special institutions are created for providing democratic legitimacy for this cooperation.

- For the representation in the 2nd chamber of parliament it can be of advantage to 'have' more than one federal unit as this might increase the representation in this chamber.
- The right to choose the place to live and to freely move from one federal unit to another might reassure people that boundaries of federal units are no dividing lines. Similarly, equal rights for all people living within the federal unit, in particular equal political rights might reassure people that they will not be second-class citizens in the federal unit where they live.
- Policies to increase the inclusiveness at the centre, e.g. in the administration, policy, army can further increase loyalty towards the country and decrease feelings of neglect and marginalization.

Special attention to the process of decision-making needed. The question of the demarcation of federal units tends to be highly contentious and will in all likelihood prolong federal debates. It will be almost impossible to come to acceptable solutions without a process that is transparent and regarded by all stakeholders as legitimate. Furthermore, it is highly recommended not to approach the issue of federal unit demarcation in isolation. If some groups demand federalism because of a feeling of marginalization, if there are competing demands for federal units, if there are likely new minorities within federal units, polarization can only be avoided by balancing a number of approaches, e.g. by ensuring some power-sharing within the federal units, by guaranteeing equal political rights to all, or by allowing for future amendments to the demarcation.

Questions:
- Are there any existing federal units that could be used as the basis of future federal units, permanently or for an interim period? Are these pre-existing units generally accepted or put differently are there strong demands for adapting or changing?
- Is there a common understanding how federal units shall be demarcated? Are there different visions or competing demands over territory?
- Do major stakeholders consider the process for deciding on the demarcation as legitimate? Does it have democratic elements? Are concerned populations consulted?

- Shall there be the possibility to review and amend federal unit boundaries in the future?
- What issues, guarantees could soften the question of federal unit boundaries?

For the external supporter:
- Dynamics of demarcating federal units can lead to polarization. Continuous monitoring of the situation is definitely a plus.
- Technical expertise alone will not necessarily lead to an acceptable demarcation. The process of coming to decisions is even more important.
- The external supporter can provide substance expertise, e.g. in the form of comparative experiences or on GIS technology.
- Most relevant is however process support, e.g. by assisting in developing the process design, by providing fora for dialogue, by supporting consultations or other aspects of the process, by providing advice on using experts.
- Substance expertise can be used to help reframing the debate, e.g. by highlighting aspects that soften the boundary questions, or by exploring possibilities to phase decisions – through temporary agreements and possibilities to revise, by exploring possibilities to delegate decision-making to sub-processes, e.g. through referenda or special commissions.
- Dialogue space for different stakeholder groups can enhance understanding of the groups own visions, interests and concerns as well as sensitize for those of others. Even intra-group dialogue tends to bring to the forefront differences that might have a positive influence on dynamics and positions. For instance, members of an ethnic group that migrated to other parts of the country might be more reserved on demarcating based on settlement patterns than those who remained within their traditional area. Intra-group dialogue can contribute to balancing positions, e.g. raising awareness among those who remained in the settlement area that at least there have to be safeguards for other groups.

CHAPTER 9: **HOW TO DISTRIBUTE POWERS AND RESOURCES?**

The distribution of powers and the allocation of resources have to go hand in hand. The distribution of powers determines the decision-making space of the different tiers of government. The allocation of resources has to match the distribution of powers. If substantial powers are allocated to federal units, federal units must also have access to substantial resources, of course always in relation to the overall financial capacity of the country. Powers without access to necessary resources are ineffective. Though theoretically the federal unit could device its own policies it cannot implement them for lack of resources. The reallocation of powers should not lead to a reallocation of costs without the reallocation of income. The negotiations on the distribution of powers should therefore go hand in hand with the negotiation on financial aspects. Also in the transition process from unitary to federal, the transfer of powers has to go hand in hand with the transfer of revenues.

Distribution of powers

Distribution of powers – at the core of self-rule. The distribution of powers between the different levels of government is at the core of the self-rule design. The distribution of powers will determine in what fields the federal units have a genuine right to self-rule and can therefore define and implement their own policies. There are huge variations among federations in respect to how much powers are provided to federal units. For instance, Germany is generally considered as a relatively centralized federation, while in the United States federal units have a high degree of self-rule (see also above Table 2). Every federation has to develop its approach as of how to establish a clear and manageable distribution of powers in order to maximise legal certainty and minimize disputes between the different levels of government. Furthermore, the transition of powers has to be managed in a way that avoids gaps in service-delivery, e.g. because the centre is not in charge anymore but federal units are unable to assume the power – based on whatever reasons. In the

debate regarding the distribution of powers many technical terms are used. These will be introduced in the following.

How to embody the distribution of powers in the Constitution. There are different methods how to embody the distribution of powers in the constitution.

- **Enumerated powers.** For instance, the United States of America, and Australia apply a system of enumerated powers. The constitution enumerates the federal powers. The federal units have the residual power; therefore, it is not necessary to specifically list the federal unit's powers. They have all powers that are not explicitly attributed to the centre. In case the residual power is with the centre, the constitution would have to enumerate the powers of the federal units.
- **Schedules.** Several of the newer federations use the system of schedules. Powers are listed in an annex of the Constitution. For instance, India applies a system of schedules. The Constitution lists powers of the federal level, the state level and proposes a list for the lower level of government. In particular, newer federations, like South Africa and Nepal, include lists of powers of the local level. Older federations have normally left it to the federal units to determine the powers of the local level.

Residual power. The residual power determines who is in charge if the constitution does not allocate a specific policy field to any of the levels of government.

- **A means to avoid gaps.** It would be futile to aim at attributing all possible powers. No person or government will be able to enumerate all powers and to foresee all possible fields of future state action. New state tasks appear (e.g. the regulation of nuclear energy or the internet). Additionally, different actors can have different ideas about how active the state is supposed to be: what tasks shall

the state fulfil and what shall be left to private initiative. The conditions and the vision of the state and with it also state tasks evolve. To avoid the situation that none of the state levels has the power to assume a specific task, to avoid that there are gaps in the distribution of powers, one of the state levels is normally attributed with the general, the residual power.

• **Who is attributed the residual power?** Most federal countries provide residual powers either to the centre or to the federal units. Older federations that came into existence by the aggregation of already existing units normally attribute the federal units with the residual powers. Some of the newer federations attributed the residual powers to the centre (e.g. India, Nepal). There are some interesting examples with more flexible approaches. In Spain 5 of the 17 federal units have residual power, for the others the residual power is with the centre, in Sudan the residual power was first defined as a concurrent power, then in the Comprehensive Peace Agreement of 2005 (Protocol on power-sharing) it was decided that "The residual powers shall be dealt with according to its nature (e.g., if the power pertains to a national matter, requires national standard, or is a matter which cannot be regulated by a single state, it shall be exercised by the National Government. If the power pertains to a matter that is usually exercised by the state or local government, it shall be exercised by the state)[45]." In Venezuela, residual power is with the states, the centre has parallel residuary powers in taxation. Parallel allocation of powers leads to the creation of concurrent powers (see below).

Different types of powers. Furthermore, powers can be exclusive, concurrent or shared.

• **Exclusive powers.** A system of exclusive powers establishes a clear separation between the levels of government. It defines which state level has the exclusive right to take action in a certain field. For instance, normally, the central level has the exclusive power to coin money; federal units might have the exclusive power to decide on primary education. Normally, countries that operate with schedules include a list of exclusive powers for the centre and for the federal unit level and sometimes also for the local level.

• **Concurrent powers.** Concurrent powers can be used by both the central and the unit level of government. In a sense, a system of concurrent powers establishes parallel competencies. In the case of concurrent powers, specific rules are required to determine which rule prevails if both state levels act based on the concurrent competency. In most countries, based on the hierarchy of norms, the legislation of the higher level of government will prevail. If this is the case, over time, a long list of concurrent powers can lead to a re-centralization of power. The more active the centre legislates the less decision-making space remains with the federal units. However, it can also be foreseen that if a federal unit legislates in the field of a concurrent power the legislation of the federal unit will prevail. For instance, in Iraq the law of the regions will prevail over central law, in Canada there are four concurrent powers. Concerning three of them the central laws will prevail, concerning the fourth, pensions, provincial laws will prevail. This approach can for instance be used to ensure a smooth transfer of powers from centre to the federal units. Such a rule will most likely lead to asymmetric federalism. Systems of concurrent powers presuppose a higher degree of consultation and cooperation than systems of exclusive powers. Countries operating with schedules normally include one list of concurrent powers. Nepal even adopted two lists of concurrent powers, one list establishing concurrent powers for centre and federal units and another list of powers for the centre, federal units and local governments. It will have to be seen how this approach works out in practice.

• **Shared powers.** Several federal countries establish shared powers with a clear distinction of tasks. For instance, in Switzerland, in certain fields, the centre and the cantons have shared powers. In these fields, the powers of the centre are limited to establishing certain principles (framework legislation) while more detailed legislation is left to the cantonal legislature. Shared powers very much resemble concurrent powers and not all scholars make a distinction between concurrent and shared powers.

• **Administrative federalism as extreme form of shared powers.** In a system of 'administrtive federaism' the approach of shared powers is carried to the extreme. Germany and South Africa and to

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45 2005 Comprehensive Peace Agreement Sudan, available at: http://www.usip.org/library/pa/sudan/power_sharing_05262004.pdf

a lesser extent Austria and Malaysia distinguish legislative powers from the power to implement. In certain fields, the power to legislate is attributed to the central level while the federal units are attributed with the power to implement and execute. Put differently, in a system of administrative federalism the administration of the federal units implements national legislation. Federal units can adopt implementation measures in accordance with their traditions and preferences. In cases of administrative federalism, the central administration can remain small because the federal units' administrations implement national policy. However, if powers of federal units are exclusively limited to execution and implementation, it is doubtful whether the country can still be termed federal. Federalism presupposes at least some areas of genuine self-rule for which federal units can define and implement their own policy.

How to attribute powers? As was shown above, there are different options and techniques how to distribute powers and embody them in the constitution. The crucial question however remains. What powers shall be attributed to the central level, what powers to the level of federal units? There are some general rules and principles that are normally applied. In practice, however, the distribution of powers will most likely be established in negotiations, in the ideal case with the broad participation of civil society and interest groups.

Who should be in charge of….? It can be useful to establish a list of all fields of decision-making that come to mind and decide who shall be in charge of what. For instance, who shall decide on the following issues:

Table 7: List of Powers

National Defense and National Security and Protection of the National Borders; Foreign Affairs and International Representation; National Flag, National Emblem and National Anthem; other flags, emblems, anthems; Citizenship and Naturalization; Passports and Visas; Immigration and Aliens; Currency, Coinage and Exchange Control; Central Bank; Bills of Exchange and Promissory Notes; Weights, Measures and Standards, Dates and Standards of Time; Taxation and Revenue Raising; Budget; Customs, Excise and Export Duties; Debt and borrowing on public credit; Intellectual Property Rights, including Patents and Copyright; Natural resources,

water and forestry; Public Lands and public natural resources; the management, lease and utilization of lands belonging to the State; Water management including disputes arising from the management of interprovincial, international waters; Water and waste management services; Supreme Court, other courts; Civil service (structure, appointment, tenure and payment); Postal Services; Transport, including roads, airports, airstrips, waterways, harbours and railways; Traffic regulations; Meteorology; Police; Prisons; States of Emergency; Disaster preparedness, management and relief and epidemics control; Disaster intervention, fire and medical emergency services; Animal control and veterinary services; Consumer protection; Wildlife Services; Census, Surveys and Statistics; Economic Policy and Planning; Commerce and trade, trade licenses; Tourism; Vehicle licensing; Firearms Licenses; Legal and other professions and their associations; Banking and insurance; Bankruptcy and insolvency; Manufacturing licenses; Town and rural planning; Public Utilities; Cultural matters; Museums and Heritage Sites; Archives, antiquities, and monuments; Regulation of religious matters; Recreation and sports; Media and telecommunication; Information, Publications, Media, Broadcasting and Telecommunications; Health; Social Welfare including pensions; War veterans, disabled, orphans, widows, care of dependents; Charities and endowment; Population policy and family planning; Registration of marriage, divorce, inheritance, births, deaths, adoption and affiliations; Mother, Child protection and care; Human and animal drug quality control; Relief, Repatriation, Resettlement, Rehabilitation and Reconstruction; Education, education policy and scientific research, primary and secondary education, tertiary education; Environmental management, conservation and protection, pollution control; Irrigation and embankments; agriculture; electricity; Local Government; Civil and criminal law; Traditional and customary law; Women's empowerment; Gender policy.

Source: based on the list of powers included in the Sudan Comprehensive Peace Agreement[46]

Some exclusive powers for each level. Every level of government should have some areas of genuine self-rule. If the centre is designed too weak, the whole country will suffer and the unity of the country is put in jeopardy. If the federal units do not have

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46   2005 Comprehensive Peace Agreement, available at: http://www.usip.org/library/pa/sudan/power_sharing_05262004.pdf.

rights to genuine self-rule, federalism remains an empty promise.

Principles. There are a number of principles that can help in deciding which level of government should be in charge of certain powers.

- **Subsidiarity principle/economies of scale.** According to the subsidiarity principle higher levels of government shall only assume those powers that cannot be effectively managed by lower levels of government. Based on this principle, normally at least local infrastructure, basic health care and parts of education are attributed to lower levels of government. Though this principle can give some guidance, it remains vague. It is not always clear which level of government is better equipped to assume power and how or against what effectiveness shall be measured. A similar effectiveness argument but more measurable based on economic criteria, without built in preference for the lower levels of government, is anchored in the principle of economies of scale. Based on this principle, units are defined so as to have an ideal/adequate size for the issue at stake. The question in this case would for instance be: Considering the size and capacities of federal units as well as existing preferences in service delivery, what kind of policies/services should be provided by the federal units.
- **Sovereignty.** Powers that are closely related to sovereignty are normally with the centre, e.g. defence, coinage of money, or foreign affairs. However, even these powers might not be completely allocated to the federal level.
  - **Foreign affairs as an example.** Many federations have attributed federal units with some powers in respect to foreign relations. In most federations, federal units can conclude treaties with (lower level authorities of) neighbouring countries in fields of their power. Normally, federal units will have to demand permission. Some Constitutions include detailed provisions regulating the foreign affairs powers and related procedures. For instance, in Belgium, federal units do not have to seek approval for signing an international treaty in advance. They have to inform the federal government when they plan to start negotiations for the signing of an international contract. The central government must inform within 30 days whether it has objections. In case of objections the negotiations are

stopped and the federal government submits the objections to an Interministerial Conference, which is composed of all the concerned ministers of the federal government and federal units. The Conference must take a decision within 30 days by consensus. If no consensus can be reached, the federal government (formally the King) can confirm the suspension of the negotiations of the treaty. However, the government can only do this if the treaty is incompatible with international or supranational obligations of Belgium, or in the case that Belgium has no diplomatic relations with the other country, or its relations with the other country are seriously perturbed. A procedure was also established for treaties within the power of the federal level and the level of federal units. In this procedure the Interministerial Conference plays a crucial role in determining the delegation that will negotiate the treaty and also in establishing a common position for the negotiations. The treaty is signed by a representative of the federal ministry of foreign affairs and a representative of the federal units. In addition, federal units in Belgium can designate their own economic and commercial attachés. Federal units can demand representation in International Organizations if matters are concerned that are within the power of federal units. In such cases the representatives from the federal level and the ones from the level of federal units form a common platform to harmonise their approaches. If no agreement on important issues can be formed, the delegation will abstain from presenting a position. According to the Constitution of Bosnia and Herzegovina, the entities have the right to establish special parallel relationships with neighbouring states as long as this does not question the sovereignty and territorial integrity of the country. For other agreements with foreign countries the entities need the approval of the federal parliament unless the parliament provides by law that such an approval is not required.
  - **Defence as an example**. Defence clearly tends to be a central matter. Army integration and adequate command structures can be sensitive topics when different countries decide to form a union or when state and non-state armies shall be integrated. In Switzerland the command of the armies was unified first and then in a later step the armies as such. Also Bosnia and

Herzegovina went through stages in the unification of the army. The exigence of a modern army, with a limited role for infantry but modern technological weaponry and need for complex risk assessments, render a federalized structure of an army more and more difficult.

- **Degree of complexity.** Also the degree of complexity or implication of policy decisions can be used as a criterion for the attribution of powers. Very complex tasks or tasks that require nation-wide planning or that have nation-wide implications are normally left to the centre. For instance, decisions on nuclear power are normally considered as far too complex and sensitive for leaving it to the federal units.
- **Common values.** A further criterion can be common values. For instance, in Switzerland criminal law was left to the regulation of the federal level, amongst others because of a shared understanding of justice. In the view of the Swiss population, it should not make a difference whether someone steals a car in one or in another canton. The sanction should always be the same.
- **Identity expression.** As a further criterion, especially if federalism is introduced to transform violent conflicts, areas of decision-making which are of importance for identity expression (as e.g. culture) can be left to lower levels of government so as to avoid conflict at higher levels of government. In divided societies it might also be of advantage to provide federal units with powers in the area of police. Policing is however a sensitive issue. While there might be opposition against police from a different region or a different community and a strong preference within the federal unit to set up its own police, minorities within federal units might appreciate the potential neutrality of national police. Policing powers for federal units can be complemented by protective mechanisms, to protect minorities. Protective mechanisms might be needed in other areas as well: For instance, if a federal unit is attributed with the power to regulate the relations between religion and the state—as it is for instance the case in Switzerland—the central level can retain the competence to protect the freedom of religion and to take measure for promoting peace between religious communities.

A right to self-organization? In particular in older (aggregated) federations, federal units have the right to self-organization. Within certain limits, federal units can determine how they are politically organized, e.g. the size of their parliament, the rules for decision-making, the mode of election, the composition of their government and its administration, their court system. However, in newer federations, federal units do not always have the possibility to decide on their organization. For instance, India and Nepal provide the political organization of federal units in the federal constitution and federal units have to adhere to it. (On this topic see more in Chapter 12: Shall federal units have their own Constitution?)

Asymmetric distribution of powers. It is also possible to attribute different powers to the different federal units. For instance, one federal unit might receive the power to establish its own police force while others might not. With an asymmetric distribution of competencies specific conditions, e.g. capacity or political mobilisation, can be taken into account, for instance Quebec in Canada, Kashmir in India are attributed with some additional powers. In many cases such asymmetric arrangements might trigger demands of other federal units to receive the same amount of powers (e.g. Spain). It can be foreseen, that other federal units will receive additional powers once certain conditions are fulfilled or that federal units can opt for additional powers.

Most important: clarity about who can do what. Irrespective which system will be chosen, whether powers will be enumerated in the main text or whether powers are listed in schedules, it is important that powers are allocated in a way that makes it clear who is in charge of what. For this to be the case it should for instance be avoided that the same power appears in more than one exclusive list, unless it is clearly indicated how to distinguish central and federal units' powers, e.g. each level is in charge of its own civil service. It is better to be explicit. For instance, instead of including education in several lists it is better to specify who is in charge of the specific aspects of education, e.g. primary, secondary, tertiary education, curricula development, school infrastructure, teachers.

Dispute Resolution Mechanism. No matter how well the distribution of powers is designed, it can be expected that some disputes will arise. There can be ambiguities, for example if the central level is in charge of national security but the federal units can legislate on the police, does the central level

have the right to introduce coordinating measures of police forces for the sake of national security? It can also occur that one state level violates the constitution and oversteps its powers. For instance, the central government might enact educational standards though education is attributed to the level of federal units. For such disputes, it will need dispute resolution mechanisms.

Courts for dispute resolution. Because the distribution of powers is embodied in the constitution, normally a court can resolve such disputes. A strong constitutional or supreme court can function as the protector of the right to self-rule. However, there are also mixed records. For instance, the American Supreme Court helped enlarge central powers by upholding a very broad interpretation of the central power to regulate interstate commerce. Even the prohibition to carry guns close to schools was justified with possible repercussion on commerce. Nevertheless, in general, the courts remain the most effective guarantor of the Constitution.

Other (additional) mechanisms of dispute resolution. Some federal countries foresee other or additional dispute resolution mechanisms. For instance, in Ethiopia the upper house of parliament has the right to give binding interpretations of the constitution. In Switzerland, the referendum mechanism shall prevent an infringement of cantonal powers. Last but not least, all federal countries have one mechanism to prevent the erosion of self-rule. Federal countries foresee the participation of federal units in central decision-making. This can serve as effective deterrent to a usurpation of powers by the centre.

Sequencing and timing of the transfer of powers. If possible, the Constitution will already contain some indication when powers will be transferred to lower levels of government. Shall powers be transferred to all federal units at the same time or will it depend on the readiness and capacity of federal units to assume powers? In case the capacity of federal units is taken as the main indicator, the question will arise how to assess this capacity and who will assess it? In particular, if less developed areas strongly advocated federalism, capacity criteria might have the effect that the strongest proponents of federalism receive powers last. This can be cause of frustration and further dispute. Any capacity criteria have to be complemented

by mechanisms that allow federal units with less capacity to catch up fast.

Sharing of public revenue

Sharing of wealth and income in federations. In any country (unitary or federal), the possibilities for economic development of different regions will not be the same. Thus, in one region there might be good conditions to set up trading facilities (i.e. because of a very good natural harbour and closeness to good universities with skilled labour), in another region there might be almost no possibilities for industries to 'set up shop', for instance because it is a desert location. Such territorially based inequalities are a fact and are often determined by geography as well as historical developments. In federations, such inequalities create the problem that not all citizens in a given polity can enjoy the same level of economic development and prosperity. If the aim of a 'fiscal constitution' is to establish a similar level of public services in the country overall, then a system of fiscal federalism needs to be introduced. Fiscal federalism is mainly concerned with the allocation of powers and responsibilities (as they determine expenditures) and of fiscal instruments (as they determine the revenues) in a federation. As the allocation of powers has been discussed previously, the following paragraphs will focus on (1) why public finance is relevant for identity questions, (2) revenue sources and tax assignment, (3) tax administration issues, (4) equalization formulas and intergovernmental transfers, (5) questions of stabilization, particularly sub-unit borrowing and finally, a (6) a discussion of the special case of natural resource sharing.

No taxation without representation. Even though taxation is only one element of public finance (as will be discussed below) the title-sentence of the paragraph shows how questions of public finance are often strongly linked with political identity issues. The sentence has been coined in the American Revolution in the mid-18th century: the American colonies were unhappy that they had to pay taxes to the queen without having any representation in the parliament in England. Here, it becomes evident how the question of taxation is strongly interlinked with questions of identity and how it can shape the relation between the state and its citizens considerably. A sound public finance system aims at finding 'surpluses' in the economy

to tax them in a fashion that does not harm the productivity of the overall country, rather these taxes should act as catalysts for economic growth. However, in countries that suffer from violence, it is often difficult to define this surplus. In countries that are in transition, the surplus has often profited mainly small elites. Additionally, such contexts are often dependent on commodity exports, have large agrarian and informal sectors and some might have recently emerged from central planning. As such, their revenue sources are different from sources in developed contexts and this needs to be taken into account when establishing a public finance system.

Resources must match powers. In order for a federal political system to unfold 'positive' effects in terms of peace, development and democracy, all levels of government and all units of government should have adequate access to public revenue. The sharing of public revenue (tax and non-tax) between the centre and sub-units is a prerequisite for multilevel governance. Every level of government and every unit of government should have own funds with which it can finance the services it wants to provide. Every country that debates on introducing federalism will thus have to take a decision on how to share public revenue. In theory it is relatively simple: for the public services that a particular level is 'politically' responsible, it needs the necessary amount of finances. Every level of government thus needs to have access to finances adequate or congruent to its allocation of powers. Unfortunately, this is very rarely the case. One of the problems is that sub-units get responsibilities but no matching funds. Or they are responsible for the payment of public administration personnel but they cannot determine the level of the salary or pension.

Different sources of revenue. In many countries that introduce federalism (or decentralise), in the debates, the prime focus is given to the assignment of revenues. The question of main concern is: which revenues sources are attributed to the central level, which to the level of federal units, which ones are shared? Different sources of revenue can be distinguished. Here and in the following especially four categories will be mentioned: The different units of government can have funds (1) from taxes, duties and fees, (2) from own (public) property, (3) from grants and transfers or (4) from loans through borrowing. Other categories include

for instance funds from own commercial activities or from donations.

- **Taxes, duties, fees.** In developed countries, taxes tend to be the most important source of income, such as for example the income tax, property tax, value added tax, inheritance tax or tax on enterprises. Custom duties and other duties are also important revenue. Furthermore, the state can demand fees from citizens and enterprises for the services it delivers.

- **Property.** Additionally, the state owns property. For instance, the centre or federal units can own natural resources such as oil, mineral deposits, forests or water, they can own the road and telecommunication infrastructure, or they can own the cultural heritage. Such property forms part of their wealth and can be used to generate income. The property right alone does not necessarily mean that the respective level of government receives all income generated from it, rather it depends also who controls and manages a particular property.

- **Grants and transfers.** Grants and transfers are normally payments by the centre to the federal units but it can also include payments between federal units or from federal units to the centre. With such grants and transfers for instance the centre finances activities of the federal units, balances existing inequalities of financial capacity or compensates federal units for services delivered on behalf of or to the centre. Grants and transfers can either be earmarked or conditional (in this case it is specified what the funds shall be used for) or they can be non-earmarked or unconditional (the federal units have discretion in using the funds). For federal systems, here particularly transfers within a possible fiscal equalization scheme are of relevance and need to be considered together with other grands and transfers.

- **Loans.** The centre and federal units can also have the possibility to borrow money, with the consequence that units of government can accumulate debts. Here especially the question is of relevance what kind of loans the sub-unit levels can get and whether the centre has an obligation to help federal units in financial distress.

Revenue assignment. A clear assignment of tax and expenditure responsibilities increases transparency and accountability. Often, however, it is not so easy to determine who should be allowed to im-

pose what kind of taxes. The decision is dependent on the particular political and cultural values in a specific context but also on how competitive a particular federal system should be. Through the assignment of particular taxes, tax competition can determine if people and businesses move away from a certain sub-unit or not. Thus, if competition shall be limited, there are some principles that are often discussed in terms of revenue assignment: Sub-unit and local governments might want to impose those taxes that have low 'jurisdictional mobility' like property taxes or sales and excise taxes. Also, any kind of benefit taxes might be well placed at the local or sub-unit level. However, progressive taxes, those that might be designed to redistribute wealth, might best be imposed by the centre (i.e. progressive personal income taxes, corporate income taxes, wealth taxes, inheritance taxes). Also taxes that can be used for stabilization purposes might best be imposed by the centre (i.e. those taxes that are subject to strong fluctuations, i.e. income that is dependent on commodity cycles or also borrowing of sub-national units). Finally, there is the question of taxes where the tax base is distributed highly unequally over a country (i.e. natural resources), which will be discussed in detail below. It is important to notice that the tax base can also be shared between different levels of government (thus, both the federal and the sub-unit level are imposing a tax on the same tax base, i.e. property or wealth); this has its own set of advantages and disadvantages. Apart from tax assignment, it is also relevant who can determine the rates and how tax collection is organized.

Setting of tax rates. Tax rates (but also other revenues like benefits or fees) can be determined by the centre alone, by the centre in consultation or cooperation with the federal units, by all federal units in coordination with each other, or by each federal unit. Federal units can have the right to freely determine their tax rate or they might have the possibility to vary the centrally determined tax rate. In Australia, the value added tax is a source of income for the federal units. However, the tax rates are determined by the centre, with the approval of the federal parliament. And, if all federal units agree, they can vary the tax rate by 10%. There are particularly two issues with regards to the setting of the tax rate that need to be discussed in federal systems. First, if a sub-unit has the right to set tax rates, it is important to understand the impact on competition, as indicated above (if one sub-unit raises taxes, then this might lead

labour and capital to move to other sub-units and increase the tax burden in that particular unit). Second, if both the sub-units and the centre co-occupy the same fields of taxation, a change in the tax rate by one of them will often reduce the taxes collected by the other level of government.

Collection of taxes. The decision on the collection of taxes is linked to questions of assignment and tax rate. On the one hand, there are concerns with regards to efficiency and effectiveness. If federal units manage the real estate registries, they might be well equipped also to collect real estate taxes. At the same time, it might be efficient if central institutions organize tax collection similarly in all sub-units. On the other hand, there might be issues of motivation and ownership. For example, if the sub-unit level collects a tax, but receives no or only a small share of collected revenues, it might be more inclined to accept a fall-out. If this is the main way how to collect taxes (i.e. by sub-unit authorities), there are ways to mitigate this effect, for example through full compensation of the collection effort or (negative) incentives. In Australia, even though the value added tax is a source of income for the federal units, it is collected by the centre but to 100% redistributed to the federal units. Regardless of who is responsible for collection, it is important to make it as simple as possible for both individuals and businesses to pay taxes.

Coordinating attribution, rates and collection. There are multitudes of ways how the different issues in tax assignment, base, rate and collection can be combined. This, of course, creates complexity but also allows to find balanced approaches in federal debates, adapted to the needs of the specific context. Interlinking these issues allows avoiding categorical debates in an all-or-nothing mind-set, but allows for balancing the different needs and interests. An important other element for balancing the overall system of public finance is the question of intergovernmental transfers.

Financial equalization. Whenever federal units have the right to rise own revenue, it is almost unavoidable that some federal units have more funds at their disposal than others. For instance, if the revenue source enterprise tax is re-allocated from the centre to the federal units, economic differences between federal units will lead to different amounts of taxes raised in the different federal units and therefore

also to different financial capacities. Federal units that are less developed and have less enterprises that can be taxed will have less financial resources at their disposal. In the worst case, the poorer federal units might be unable to raise enough revenue to assume their constitutionally attributed powers. Richer federal units might be able to provide more and better services to their citizens than their poorer neighbours. Citizens in poorer federal units might have to pay extra to receive comparable services. Strong inequalities in financial capacity of federal units can hamper the equality of the citizens.

Pros and cons of equalization. Thus, the question what extent of inequalities do we want to allow and how can we mitigate them? Germany, for instance, follows the approach that all citizens irrespective of their place of residence shall have access to the same standard of services at the same price. Also, Australia aims at creating equal capacities of federal units. Australia considers financial equalisation achieved "if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.[47]" Other countries, like for instance Switzerland, accept a certain level of inequalities and differences in public services and provide only for a certain level of financial equalisation. The United States of America does not foresee any direct financial equalisation at all. The answer to this question is therefore first and foremost a political and not a technical one and needs to be negotiated between the central level and the sub-units. There are political considerations for introducing such a formula, like creating a joint political union or also diminishing the possibility of secession. Economic considerations, i.e. integrating fiscally disadvantaged regions in a national economy, or also the efficiency in market resource allocation. There is however also considerations against equalization formulas, like the problem of tax base mobility, but also that there might be disincentives for some sub-units to engage in their own local development and if there is a situation where a centre mainly distributes to the sub-units, the fiscal possibilities of the central government are constrained.

Different designs of equalization. It is clear that often in federal systems the uniform treatment of different sub-units causes injustice. Thus, if those sub-units that are wealthy receive the exact same amount than those that are not wealthy, the latter do not have the possibility to develop. Thus, there needs to be a societal consensus on an affordable sharing design and also a consensus on how to finance it. There need to be clarity on the objective(s), and the design needs to be consistent with the objectives. Shah distinguishes different kinds of such designs[48]: (a) a *parental design*, where the centre is mainly distributing money to its sub-units (vertical). (b) a *fraternal or solidarity design*, where the sub-units mutually decide to have equal quality of service delivery in the country overall (horizontal). And finally, (c) what he calls a *'Robin Hood' design*, where revenues from rich sub-units are involuntarily taken to be distributed to raise the standards in the poorer sub-units (horizontal).

Decision- making equalization. It will be higly relevant to determine who decides on these sharing formulas. Some countries foresee special commissions for deciding on redistribution formulas, e.g. India and Nepal. In Switzerland it is mainly a political process involving foremost the different cantonal finance directors. It might be possible to talk of 'fiscal principles' that are established with the participation and ownership of all relevant groups. Often in federations, some aspects of revenue sharing will be regulated in the constitution, in particular criteria of the distribution formula. It will be highly relevant to introduce a formal legal framework apart from fiscal principles, (i.e. fiscal arrangements act), which might be adopted by the national parliament in which it is also clearly determined when a particular formula will be renewed or renegotiated. Finally, it is important to discuss arrangements for conflict resolution.

Basis of equalization. Another important decision for the design of an equalization formula is: do we want to establish equality of fiscal *capacity* or fiscal *needs*? Fiscal capacity basically tries to equalize the amount of revenues that each sub-unit receives per *capita*. Especially when the federal units can set their own tax rates and can determine their own collection scheme, the collected amount is not necessarily the appropriate criteria to establish fiscal capacity.

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47 Singh, S. K., 2008: Public Finance in Theory & Practice, New Delhi: S. Chand Publishing, p. 244.

48 Shah, Anwar, 2004: Fiscal decentralization in developing and transition economies: progress, problems, and the promise. Washington: World Bank policy research working paper. p. 82.

Only if the tax base, the tax rate and the tax collection are harmonised, collection results can serve as an indicator for fiscal capacities. Otherwise, the potential tax base might form a more adequate indicator. As will be discussed below, natural resources need to be taken into account when assessing fiscal capacity overall. Fiscal needs refer to particular geography, societal or other issues that determine the expenditure needs of a sub-unit and form a different basis for equalization formulas. For instance, mountainous federal units might need more funds for local infrastructure—e.g. road building is more expensive—than federal units in the plains. Perhaps also some federal units might need additional funds to do special investments in order to reduce long term dependency e.g. investments to catch up in economic development. Also, populous, highly urbanised federal units have different needs than rural federal units. To evaluate these needs and to put them into figures is not only technical but will to some extent also depend on the political importance given to the different aspects. For example, in Switzerland the equalization formula takes into account the population density (which is a proxy for urban or mountainous areas), the people over 80 years, the amount of social welfare recipients, the foreign adults and whether the sub-unit hosts a large city. Often, equalization formulas are a mix of those two basic approaches (needs and capacities).

Administrative questions of equalization. Apart from the more principled issues of transfers, there are other management issues that are relevant: what shall be considered as relevant amount for re-distribution and what shall be the intervals for redistribution. It needs to be determined how the amount of revenues for distribution is calculated. Are costs for revenue raising or revenue collection deducted before the distribution of collected revenue? Is it easier to work with estimates of tax revenues? However, if there are no post period adjustment mechanisms there is a high incentive for the collecting authority to make conservative estimates. Additionally, it should be determined how often and by what means the distribution of revenues is taking place. It might be relevant for the sub-units to clearly define this frequency and also to determine penalties for late-payment.

Determinants

Societal factors
Public attitude towards equality
Consensus on affordable scheme
Take into consideration ethnic tensions

Economic factors
Level of economic development
Maturity of market relations
Scale of state involvement

Institutional factors
Formation of public administration

Principles

1. **Clarity** in objectives and consistency of design with those objectives
2. **Transparency**
3. **Predictability** and Revenue **Adequacy**
4. **Fairness** (fiscal capacity / fiscal needs)
5. Regular **review** of scheme
6. **Flexibility** in the use of resources for citizens (allows citizen based-accountability)

Source: Andrea Iff based on Shah

Questions of borrowing. In the paragraphs above we have discussed the main issues of a public finance system: allocation and (re)distribution. As a third field it is important to mention stabilization issues. Within that field, for federal systems, mainly the question of sub-units' borrowing is relevant. Oftentimes, there is a concern that sub-national units might be more prone to 'overspend' than the central government. The arguments for this are manifold: For example, the centre will often 'bail out' a sub-unit if it is indebted which then leads to less control by lenders, as they think the central government will guarantee for the sub-units. Or sub-units are only responsible for tax collection but not administration and then they have no incentive for efficient tax collection (as indicated above) which leads to more borrowing. There are different possibilities how to manage this challenge: (a) The central government does not set any limits to sub-unit borrowing (how much, to whom, and what to spend it on) and the sub-units can borrow from the capital market. However, this means that the sub-units must have a very good credit-standing in the capital markets and therefore often introduce self-imposed fiscal rules. Such a system exists in Canada, Switzerland and the United States. (b) The central government has direct control over sub-unit borrowing. This can be through approval and conditions as in India and Bolivia, through limits to the overall debt like in Lithuania or through a centralization of all government borrowing like in Indonesia. (c) The central government imposes fiscal rules in the constitution

or in laws like in Germany or Spain. And finally, there is the possibility for a (d) collaborative arrangement. In this case, sub-units are actively involved in the formulation of macro-economic objectives of stabilization and become co-responsible for their achievements.

Natural resources. Natural resources can be roughly defined as anything that the environment provides and that has value on the market (commodification). We distinguish between renewable (water, timber, fish or game) and non-renewable (oil, gas, minerals) resources. For public finance, another relevant distinction is whether natural resources are so called high-value natural resources like oil, gas, mining, which pose different fiscal and financial problems than most of the so called renewable resources like land or water. Issues that concern natural resources are often highly relevant in federalism debates. Thus, after a short introduction on the relevance of natural resources in federalism debates, the topic will be discussed along the main issues raised above generally for public finance systems: questions of allocation (where does the powers and responsibilities for natural resources lie?), (re)distribution (who gets revenues from natural resources?) as well as stabilization (what are influences on monetary or other macro-economic issues when dealing with natural resources?). We argue that in situations where natural resources have been a driver of a conflict or a transformation this should be a central component of any federalism debate.

Natural resources and federal systems. Natural resources tend to be unevenly distributed without respect to state or other boundaries. Oftentimes, they might be concentrated in a particular region of a country. Therefore, the benefits but also the social and environmental costs (environmental degradation, resettlements, etc.) that are connected with those natural resources are often unevenly distributed. Apart from questions of revenues, also these costs can lead to conflicts between the production/extraction region and the rest of a country. For renewable resources like water, questions are different. For water in particular, questions circle around variability of resources and questions of user rights (upstream and downstream). In a federal political system, resource rich regions have a greater possibility to raise revenues which can lead to greater fiscal imbalances (and thus have an impact on the provision of public services). Furthermore,

natural resource rich sub-units might be able to attract more economic activity than other sub-units and therefore might use all the revenues from high-value natural resources (i.e. for infrastructure building) whereas the other sub-units cannot profit from those revenues (and possibly savings). Thus, some authors argue that problems related to natural resources might be more nuanced in federal systems.

Natural resource ownership. As with other issues in public finance, the first question is: to which level are powers and responsibilities assigned to. With natural resources, it is not first and foremost a question of revenue generation, but before that, it is a question of ownership of natural resources. Often, in federalism debates this is an emotional issue and requires balancing of private and public claims, cummunal and customary rights. Natural resources can be owned (a) by a private individual or a corporation, (b) by a group of people (customary or communal title), (c) by the state (central or sub-unit) or finally, a mix of those options. Constitutions rarely describe private ownership; they describe issues of compensation and environmental issues and often distinguish between surface (often private and communal) and subterranean resources (often state).

Ownership in federations. Natural resources can be owned by either level of government in a federation. For high value natural resources, the practice in existing federations is determined by their formation process. When they have been formed by aggregation, then the property and ownership rights lies with the sub-units (Australia and Canada). If they have formed by de-aggregation, then the ownership rights tend to lie with the central level. One of the reasons for this is that particularly for high-value natural resources (but also for water in generating hydroelectricity through dams) resource exploitation requires a lot of investment, mainly in infrastructure but sometimes also in terms of labour and capacity building. More recently, a balanced approach to ownership has been found in several countries where regional aspirations have been included in national rules and regulations like in Iraq, Indonesia and Nigeria (see table 8). At the same time, this might be different for other natural resources like land which is strongly connected to property taxes. Oftentimes, these are assigned to the lower levels of government and are also an important source of income for developing countries.

Table 8: Natural resource ownership

Ownership with centre	Ownership with sub-unit	Ownership shared	Ownership asymmetrical
Nigeria National Parliament has exclusive legislative authority over mines and minerals, including hydrocarbons. [Section 39 of the Exclusive Legislative List]	**Canada** Provincial legislatures and governments are given exclusive authority to make laws related to exploration for non-renewable natural resources; development, conservation and management of non-renewable and forestry resources. [Article 92]	**Iraq** The federal government, together with the producing regional and provincial governments, are given the responsibility to formulate strategic policies to develop Iraq's oil and gas wealth to achieve the highest benefit to the Iraqi people. [Article 12.2]	**Indonesia** Council of Representatives of the Regions (Upper House of Parliament) given exclusive responsibility for legislation related to the management of natural resources and other economic resources. [Chapter VIIA 22D Sections 1 and 2]

Source: Based on Haysom/Kean[49] with own modifications

Natural resource control and management. Despite the ideological relevance of ownership, finally, the question who owns natural resources is often less important than the control and management (An interesting example is the agreement between the two Sudans, where even though there was never an agreement on ownership of the oil, there is an elaborate and detailed agreement on processing and management as well as sharing of revenues.) The main question for control and management is: who has the authority to make and administer laws relating to the exploration, exploitation, processing or development of natural resources? Such allocation of powers can have profound effects on the overall

development of a particular industrial sector within a country. Also, very often these authorities are coupled with the right to collect revenues (contracting authority, licensing, royalties, import and export permits and tariffs) and the question of dispute resolution. There are several arguments for assignment to the lower levels of government: the sub-units can address their specific needs (which they know better than the centre) and also, they can better deal with the possible 'negative externalities' like environmental damage or other issues than the centre.

Natural resource revenues. After determining who is responsible for control and management, and thus tax administration and collection efforts, the question is how revenues from natural resources are shared (still, it is important to understand the particular link between the above mentioned transparent and fair collection of revenues with their sharing). Often, revenues from natural resources are handled separately from other revenues (tax and non-tax). The main question with regards to resource revenues is how much the sub-unit where the natural resource is located receives. There are three broad approaches to this:

- **Both can impose taxes.** Sub-national units are allowed to impose and collect certain types of taxes, the centre is allowed to impose and collect another kind of taxes like in Canada. The advantage here might be that it is not an either-or-solution but both the sub-unit as well as the centre profit from the revenues. At the same time, this might lead to complicated arrangements with the possibility that there are too many taxes and charges which is bad for 'business'. One example is Canada, where the natural resources belong to the provinces. As they have a lot of revenues from the oil industry, they are left out from the federal equalization transfers. Furthermore, the provinces can set personal and corporate income taxes on a federal tax base, which mitigates their revenue volatility by providing a stable revenue source.
- **Centre collects and gives to sub-units.** Taxes are collected in one account and then shared between the different levels of government like in Nigeria, Venezuela and Indonesia. Such a formula for redistribution must address those issues that have already been discussed for the 'normal' equalization formula in federations. One example concerning oil revenues is Nigeria where after

49 Haysom, Nicholas / Sean Kane, 2009: Negotiating natural resources for peace: Ownership, control and wealth-sharing, Geneva: HD Centre for Humanitarian Dialogue p. 4

heavy conflicts, where a constitutional convention decided to increase the proportion of derived revenues allocated to the oil-producing regions to 13%. Thus, after a deduction of the 13%, the remaining revenue is distributed to the federal level (53%, the other states 27% and the local governments 20%). One of the disadvantages of this option is that there must be a lot of 'trust' between the centre and the regions that the transfers will finally be made in the amount that was agreed upon. However, there is the possibility to integrate some guarantees in the constitution or other agreements.

- **Combinations.** If there is a political will to have some kind of asymmetrical solutions, then it is possible to have a formula and additional income that is more favourable for oil rich sub-units like in Indonesia and Iraq.

Stability and natural resources. Natural resource commodities, whether processed or not, are traded on international markets. Thus, natural resource rents are often very volatile and the prices are difficult to predict so that revenues might be unstable. Particularly in developing countries, resources are one of the most important sources of revenue. Therefore, macro-economic management of the revenues is crucial; depending on the agreement between the centre and the sub-units, this needs policy coordination. Often, this is managed by so called natural resource funds where surplus income is 'stored'. Governments can then use these funds to cover budget deficits, use for investments for future generations or earmark the funds for development projects. It might be wise to clearly determine if and how such funds do respond to the overall needs of a country or to the specific region where a natural resource is sourced or processed. The sheer existence of such a trust does not indicate transparency or accountability; it can as well serve as a possibility for patronage and corruption.

In conclusion. Income and wealth sharing are very important aspects in debates on federalism. Without the relevant resources, powers and responsibilities of sub-units remain 'empty' and can create further conflict and frustration. There are several opportunities in decentralizing fiscal powers to sub-units: First, own funds bring local elites in a situation where they have to be accountable to their own people. Second, by giving the central level substantial resources, an overall balance by fostering

national development projects and equalizing differences in fiscal capacity or needs can be achieved. Finally, a discussion on a just public finance system can foster a sense of overall solidarity and reconciliation which might be relevant particularly in situations after violent conflict or in democratic transitions. Finally, the system of public finance with a possible 'fiscal compact' will show if different groups are ready to '*put their money where their mouth is*', as the overall system of public finance is more than numbers, it is a reflection of the self-understanding of the state, of the understanding of power balances and also of justice.

Questions:
- What criteria shall be applied for the distribution of powers?
- Who shall have the residual power (the power to decide when the constitution is mute), the centre or the federal units?
- What kind of exclusive powers shall the federal units/the centre have? What kind of powers shall be concurrent (the centre and the federal units can regulate)? Which regulation prevails in the case when both the centre and the federal units regulate?
- Shall there be shared powers, e.g. the centre defines the policy or standards, while the federal unit level administers and enacts bylaws?
- Shall all federal units have the same amount of powers or shall asymmetries be possible?
- How shall powers be listed in the constitution e.g. in schedules, enumerated powers? Shall the powers of the local level also be regulated in the Constitution?
- In how far shall the centre have the possibility to delegate powers to the federal units? Shall the centre have the possibility to delegate powers only to some selected federal units? In how far shall federal units have the possibility to delegate powers to the centre or to lower levels of government?
- Who will implement central and federal unit legislation? Will branches of the central administration be in charge of implementing central legislation or will the federal unit administration fulfil this task.
- Is the distribution of powers realistic/implementable? Does the Constitution provide a clear picture on who is in charge of what?
- Do resources match powers? What minimum resources do federal units need to assume their

powers? Is the transfer of powers harmonized with the transfer of resources?

- What sources of revenue shall be allocated to the different levels of government? Shall revenue bases be shared or attributed exclusively to one level only? Who will tax income of persons and companies, sales, services, land, vehicles, others?
- Who shall own/control natural resources (water, forest, oil, coal, others)?
- How and by whom shall rates for taxes, duties and royalties be set?
- Shall there be fiscal competition between federal units and different financial burdens for citizens?
- How shall revenues be distributed? Who shall be in charge of revenue distribution? Shall there be conditional and non-conditional transfers? Shall the rules/quotas for distribution be regulated in the Constitution? Are there regular review mechanisms to readjust the attribution of revenues?
- How shall differences in financial capacity and service provision costs of federal units be addressed? Shall there be equalization mechanisms? How shall equalisation take place? To what level? By whom? Who decides?
- What shall be the budgetary powers of federal units? Shall federal units be able to borrow?

For the external supporter:

- Each level should at least have some substantial powers, apart from this there is a huge variation in the extent of self-rule. The extent of self-rule is thus a sovereign decision of the country and there are limited international standards or universal good practices.
- Support might be most effective if focused on methodologies, e.g. methods for costing of services, ways to note powers in the Constitution, establishing criteria for the distribution of powers, as well as providing insights into different options and their consequences, e.g. different ways of financial equalization.
- For assessing different proposals it is important to watch out for potential ambiguities (based on the proposed text, is it clear who is in charge of what?), as well as for the match between powers and resources. The interplay between power and resources will also have an important influence on good governance, in particular accountability.
- Furthermore, it is beneficial to look at the proposed powers and resources from a perspective of implementation. This perspective helps to find out whether proposals, in particular timelines are realistic.

CHAPTER 10: WHAT TO CONSIDER WHEN ESTABLISHING THE SECOND CHAMBER OF PARLIAMENT?

Second chamber – core of shared rule. While the distribution of powers and resources is at the core of self-rule, the second chamber of parliament (upper house) tends to be at the core of shared rule[50]. Federalism requires shared rule. Federal units must have a guaranteed say in national decision-making. This shared rule aspect constitutes one main difference from decentralised forms of government. In decentralised forms of state organization, decentralised or autonomous units are not specially represented in central decision-making. Shared rule shall achieve that the centre is aware and has to listen to the concerns and interests of the federal units. Decision-making at the centre shall balance the general interests of the nation and the interests of the various federal units. Additionally, through their participation in central decision-making, federal units give legitimacy to central politics and with it to the state as such. Shared rule encourages the emergence of a common vision for the state and therefore also contributes to holding the country together.

Second chamber as representative of the federal units. Shared rule is normally realised by the creation of a second chamber of parliament that represents the federal units. However, not all countries that are depicted as federal opt for a bicameral parliament. There are some exceptions (Comoros, Micronesia, St. Kitts and Nevis, United Arab Emirates, Venezuela). Some of these countries found other ways of representation for federal units, e.g. special representation of federal units in the unicameral parliament. For others it can be disputed whether they are really federal or whether the label federal is misleading. The clear majority of federal countries have a bicameral legislature. The second chamber of parliament is normally not the only way, how the federal units can influence central decision-making. Especially procedures

for constitutional change tend to give relevance to federal units but also forms of intergovernmental cooperation. Of course, not all countries with a bicameral parliament are federations. It depends on the purpose and function of the chamber. In a federation, the main purpose and function of the upper house is to represent the federal units.

Representative of the federal units only? The upper house can either be composed entirely of representatives of the federal units or of representatives of the federal units and others. E.g. in Ethiopia, additionally to the federal units, the nations, nationalities and peoples are represented. In Belgium the regions and communities are represented. In Sudan, according to the Constitution, next to representatives of the federal units there are also two representatives for the region of Abyei. In Nepal, the federal units are represented but the Constitution includes guarantees that the group of representatives from the federal unit is composed in an inclusive way.

Representing the federal unit or the people of the federal unit? Representatives can be members or agents of the governments of the federal units (e.g. Germany) or representatives of the people of the federal units, e.g. elected by democratic vote in the federal unit as in Nigeria, Brazil or the United States. Representatives can be subject to directions by the government. In Germany representatives of one Land have to cast a block vote, i.e. they can only vote if they can agree on how to vote. In the United States each representative is supposed to vote according to his conscience without instruction. The understanding of the second chamber, whether it shall represent the political institutions of the federal units or directly the people of the federal unit will have repercussion on the mode of selection (direct elections, indirect elections, appointment (see below). If members of the upper house are elected by the federal unit's legislature or appointed by the political institutions of the federal unit, the (political) pressure to represent the official interests of the federal unit are bigger.

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50 In countries with executive federalism, in some cases, forms of intergovernmental relations can be more powerful than the shared rule through the representation in parliament.

Equal or weighted representation? There are also various options concerning the number of representatives per federal unit. In some federations, all federal units have the same number of representatives (e.g. United States of America, Argentina, Brazil), in other countries representation is weighted. For instance, in Belgium of the 21 representatives drawn from community councils, 10 are from both the Flemish and French communities and one is from the German community. In Germany the number of representatives ranges from 3-6 depending on the population size of federal units. Canada establishes a regional focus: 24 representatives are from the Maritime provinces, 24 from Quebec, 24 from Ontario, 24 from the Western provinces, six from Newfoundland and 1 from each territory.

Symmetric or asymmetric powers? Powers of the upper house can either be symmetric or asymmetric to powers of the lower house of parliament. In Bosnia and Herzegovina both chambers have symmetric powers. This means for instance, all laws need be adopted in both chambers of parliament. In some federal states the second chamber of parliament has additional or specific powers. In Brazil, both chambers have symmetric powers concerning legislation however the upper house has exclusive power to approve presidential nominations and authorize debt margins for the states and municipalities. In Ethiopia, the House of Federations is sole custodian of the Constitution and has the exclusive right and ultimate authority to interpret the Constitution. In Germany, two categories of laws are distinguished: laws that require the consent of the upper house and laws for which the upper house has only a suspensive veto. The first category of laws includes mainly laws that directly concern the interests of federal units. Whenever legislation needs to be passed by both chambers of parliament, procedures to arrive at a common version of the law have to be instituted. In particular in the case of symmetric powers, there is the need for procedures which can break a potential deadlock between the chambers.

Direct or indirect elections? Nine federal countries primarily rely on direct elections for selecting the representatives of the upper house (Argentina, Australia, Belgium, Brazil, Mexico, Nigeria, Spain, Switzerland, United States of America). The other federal countries select the representatives of the upper house primarily through indirect elections (e.g. Austria, Bosnia and Herzegovina, Germany), primarily

through appointments (e.g. Canada) or based on mixed systems. It is possible to foresee election for some members and appointment for others. India for instance foresees the appointment of 12 members by the president and for the remaining members election by the state legislatures. Ethiopia leaves it to regional states to determine whether they want to select their representatives in direct or indirect elections. In Pakistan representatives from provinces are elected indirectly, those of federally administered tribal areas directly. In Russia each constituent unit has two representatives, one elected by the legislature, one appointed by the executive of the constituent unit. Mixed systems mainly aim at including a broad range of interests. In general, appointments and indirect elections assure stronger political influence of the federal units' political institutions over the upper house. However, the representatives' legitimacy is weaker. Direct elections limit the political power of the federal units on the representatives; however, the representatives' legitimacy is higher because they have a direct mandate from the people.

Proportional or majoritarian? For the election to the upper house the federal countries have the choice between proportional electoral systems (e.g. India) or majoritarian electoral system (e.g. Brazil) or mixed systems (e.g. Mexico). The smaller the number of representatives that can be elected in one constituency the more similar the two election systems are.

Parliamentary and Presidential systems. There tend to be some differences for the organization of the second chamber depending on whether federalism is combined with a presidential or a parliamentary system. The most important difference is that in parliamentary systems the two chambers of parliament do normally not have equal powers. Only one chamber, normally the lower house, elects the Prime Minister and therefore also this chamber has stronger oversight functions than the second chamber. In presidential systems, the two chambers tend to have equal powers and an equal role in oversight. In presidential systems, direct elections of members of the upper house are more frequent than in parliamentary systems which more frequently rely on indirect elections or appointments. Also, most presidential systems provide equal representation to the federal units while a larger number of parliamentary systems rely on weighted representation.

In conclusion. The major objective of the second chamber/upper house is to provide representation of federal units at the centre. The second chamber shall guarantee that federal units have an effective say at least when important decisions are taken. A number of elements will influence how the second chamber/upper house will be organized. For instance, if there are huge discrepancy in population size of different federal units there might be demands for weighted representation; if federal units are demarcated without consideration of settlement patterns of communities or when there are substantial minorities within federal units there might be demand to also provide for representation of different groups either by establishing guarantees of inclusive representation within the representatives from federal units or by providing for some seats for such groups; and then last but not least it will depend on whether the country has a parliamentary or a presidential system.

Questions:
- How shall federal units be included in central decision-making? How shall their interests be protected?
- How shall the upper house of parliament (second chamber, representing the federal units) be organised?
- Who shall be represented, 'only' the federal units or also other territorial units or groups? Shall there be requirements that representatives from one federal unit fulfil certain inclusiveness criteria? Shall all federal units be represented equally or shall representation be weighted (more populous federal units having more representatives)?
- Shall federal units be able to decide how to select representatives? If the mode of selection shall be regulated in the constitution, shall representatives be directly or indirectly elected or appointed (by whom – federal unit government or legislature or centre), or shall a mixed system be introduced? If they are elected, what electoral system shall apply?
- Shall representatives of one federal unit have one combined vote or can each representative cast a separate vote? Shall federal units be able to instruct their representatives how to vote?
- What are the powers of the upper house in relation to the lower house? Do both chambers have equal powers? Shall the upper house have less powers (e.g. for adopting legislation), shall the upper house have more powers (e.g. in respect to the budget) or additional tasks (e.g. to weigh over the inclusiveness of institutions)?
- More specifically, how shall the legislative process look like especially if/when both chambers are involved: who starts debating, what happens when the two chambers disagree, can the upper house veto or delay legislation?
- Shall there be joint sessions of both chambers of parliament, on what occasions, for what tasks? Shall there be joint committees, e.g. to resolve disputes?

For the external supporter:
- Quite often when federalism is raised as a demand by groups that want more internal self-determination the focus is on self-rule and the second chamber is almost forgotten. The second chamber is however crucial for balancing centripetal and centrifugal tendencies. By participating in the second chamber federal units give legitimacy to the central decision-making and the state. There are however also cases in which the composition of the second chamber is high on the agenda in particular when groups do not only want self-rule but want to decisively change the power-balance at the centre, e.g. build a counterweight/a veto mechanism to the lower house for instance when the lower house is dominated by one group that forms a majority in the country. In such cases, deadlock breaking mechanisms between chambers of parliament are even more important.
- Final decisions on the second chamber will only be possible when other aspects of the system are defined, e.g. the demarcation of federal units or the system of government. Nevertheless, related issues should be considered earlier on. For instance, the impact of demarcation on representation might influence preferences for demarcation: when there is an agreement in principle that representation shall be on an equal basis, a bigger group that previously demanded one federal unit for its settlement area might change its preference to more than one in order to improve representation at the centre. A decision on demarcation might become controversial when it leads to substantial under-representation of groups and to the fear of being continuously outvoted in the second chamber. Thus, discussions on different aspects have to go hand in hand and decisions should be only finalized in a relatively late stage of the process.

CHAPTER 11: HOW MUCH IMPORTANCE SHALL FEDERALISM GIVE TO ETHNIC DIVERSITY?

Federalism and ethnicity. The debate on ethnicity and federalism is foremost a debate on how much relevance ethnicity should have in politics, how such relevance shall be achieved and what potential consequences such relevance can have. In most cases there is a specter of views, with as extremes on the one side those who demand as much relevance for the own ethnic groups as possible and on the other those arguing for complete neutrality or ethnicity blindness of the state. Once the debate leads to a juxtaposition of these two views stalemates are very likely. Whenever there are ethnic groups who demand federalism it tends to be unrealistic to introduce federalism that does not pay reference to ethnicity at all. On the other hand, designing federalism solely based on the logic of giving relevance to ethnicity might be detrimental, too: ethnicity can evolve and is never the only aspect of ones identity and political mobilization solely based on ethnicity can be harmful for the unity of the country.

Ethnic federalism in particular. Whenever different ethnic groups promote federalism it is very likely that at one point during the debates the term 'ethnic federalism' will come up. Sometimes, the term is used to disqualify demands by ethnic groups and to provoke fears of potential minorities. The use of the label 'ethnic federalism' is normally not very useful for the overall debate. Federalism is supposed to create a balance of centrifugal and centripetal forces based on its combination of self-rule and shared rule. It is supposed to allow for diversity in unity, for individual, group and national identity. Pure ethnic federalism might not achieve this. Federalism with some respect for identity – including ethnic identity – however might. The focus of the debate should be on how best to accommodate and balance the different interests.

What is ethnic federalism. Ethnic federalism incorporates a number of structural, institutional and policy related stress factors. In particular in combination they can be harmful. There is no overall accepted definition, when federalism can be qualified as ethnic. The following structural, institutional and policy choices are associated with ethnic federalism:

- Federal units are demarcated so as to create ‚own' federal units for communities.
- Names of federal units reflect that they are the federal unit of a certain community.
- The name-giving community has a privileged position within the federal unit or in representation of the federal unit at the centre, e.g. through special political rights.
- The governance system, including the electoral system promotes political mobilisation along ethnic lines.
- The community has an explicit or implicit veto power over decisions at the centre.

Bosnia Herzegovina as an example. Bosnia Herzegovina is an example of ethnic federalism. The country and its institutions are solely defined in an 'ethnic' logic. The federation consists of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (called "the Entities"). The entity Federation of Bosnia and Herzegovina is again organized as a federation – as already the name suggests, with one federal unit for the Bosniak and the other for the Croat community. The Republika Srpska is considered as the homeland of the Serb community. The preamble defines Bosniacs, Croats, and Serbs, as constituent peoples (along with Others). Like other federations, Bosnia and Herzegovina, has a two chamber parliament. For the composition of both houses, ethnicity is the prime criteria. The Upper House, termed as House of Peoples, is composed of five Bosniaks, five Croats and five Serbs. They are indirectly elected by the assemblies of the entities. Also in the House of Representatives the different communities receive equal representation. The chambers of parliament are chaired by a Croat, a Bosniak and a Serb on a rotating basis.

Federations that ignore ethnicity. However also federations that ignore the existing ethnic diversity can include structural, institutional and policy

related stress factors in particular if different communities are mobilised, see their demands unanswered and interpret the - on the surface neutral - system as directly or indirectly favouring the dominant community. E.g.

- If there is no recognition of diversity
- If federal units are demarcated so as to disperse communities
- If some communities factually have reduced chances for representation within a federal unit or at the centre
- If the electoral system or the political process does not allow to express political preferences based on identity
- If one community is regularly outvoted.

All a matter of balance. There are many ways to provide for group accommodation or seek middle ways to accommodate groups without adopting ethnic federalism. Which ways are acceptable will depend on the specific context. Approaches can include:

- Different groups as well as the people as such can be acknowledged in the preamble.
- Various criteria for demarcation can be balanced. In addition, approaches can be adapted to the local conditions, e.g. leading to some federal units that are demarcated along geographic lines and others that give more priority to settlement patterns.
- The naming of federal units can allude to aspects that all can identify with or include multiple identities.
- Federal units that are demarcated according to settlement patterns can still carry neutral names to avoid too strong symbolism.
- Bigger communities can be convinced to accept more than just one federal unit for the sake of the overall power balance.
- Other elements can be introduced to balance some of the effects of demarcation, e.g.
  - equal rights for all people living within the federal unit, in particular equal political rights, special minority rights
  - a centre that shows respect to all groups and acts as protector of human and minority rights,
  - nation-wide policies for the protection of vulnerable groups that have to be respected and implemented by all federal units,
  - the right to choose the place to live and to freely move from one federal unit to another,

- possibilities to cooperate with people from the own group who live in another federal unit.
- Equitable representation of all groups in state bodies, including in the police and army
- Guaranteeing representation to groups in one chamber but not necessarily in the other.
- Mechanisms that achieve representation without the recourse to fixed quotas or explicit guarantees, e.g. delimitation of constituencies with some reference to settlement patterns
- Some special majority requirements to prevent that groups are continuously outvoted or alarm bell procedures to ensure that concerns of different groups are discussed and considered.

In conclusion. Federations that are blind to the ethnic diversity of their population are not more likely to be peaceful than federations that acknowledge diversity. The complete denial of the accommodation of identity can be as harmful as creating a system that is entirely based on identity considerations. Again, the debate must not be either-or but the question is much more: how much of an ethnic flavour shall the federal organization have? The debate should consider in how far different groups can/shall be accommodated so that it is conducive to the balancing of different interests – of the nation, the group and the individuals. In the end, structures, institutions and policies have to create a balance to promote the recognition, representation and rights of all segments of society while allowing for changing alliances based on various interests.

Questions:
- What are demands of different ethnic groups and why do they raise these demands?
- What are responses from others and why do they respond in such a way?
- What effect is the proposed federal system likely to have on political mobilization, on relations between different groups, between majorities and minorities?
- What multitude of approaches could respond to demands for group accommodation? What combinations can address the interest of the majority and minorities?

For the external supporter

- It very much depends on the design of federalism and on the structure of diversity whether federalism can accommodate groups. It is always useful to consider various options of accommodating diversity. Federalism is only one of these options.

- Words carry emotions. In many parts of the world the term 'ethnic federalism' carries a negative connotation. It might help to avoid these labels as far as possible and to explore the concerns and various options that might address concerns. Also, when the term is used, it is recommended to look deeper and assess whether the proposed system is likely to encourage ethnic mobilization.

- Whenever federalism is introduced in order to accommodate different ethnic groups it is important to assess the consequences for new minorities as well as for the overall majority within the country. Only a system that accommodates all its citizens, that balances particular and national interests can provide sustainable peace and stability. Systems that lead to political mobilization solely based on ethnicity face the risk that unity is eroded. Systems that do not recognize existing diversity easily lead to alienation of groups and face resistance.

CHAPTER 12: SHALL FEDERAL UNITS HAVE THEIR OWN CONSTITUTION?

Sometimes contested. At one point during the federalism debates the question will come up whether federal units shall have their own constitution. In particular when federalism is demanded for the accommodation of identity-related diversity, groups tend to push for the right to have subnational constitutions.

Approach in older federations. When federations came into existence through a process of amalgamation or aggregation (see part I), these entities often already had constitutions. Thus, their constitutions continued to exist with the formation of the federation, e.g. Australia or Switzerland. With the adoption of a national constitution the "old"/previous constitutions turned into subnational ones. Canada forms an exception in this respect in so far that the entities did not have written constitutions and with the exception of British Columbia still do not have one.

Approaches in newer federations. The newer federations emerged from unitary states, in which the newly established federal units did not have pre-existing constitutions. There have been different approaches:

- In some federations, federal units were entirely constituted in the new federal constitution, in different words the central constitution also defined and established the institutional structure of the federal units (e.g. Nepal).
- Some of the newer federations mandated federal units to pass their own constitution (e.g. Ethiopia).
- Other federations gave the option to federal units either to adopt or not to adopt their own constitutions (South Africa).
- Others again barred sub-national units from having their own constitutions in principle but allowed it in special cases (India in respect to Kashmir).

What are subnational constitutions? Before looking at the merits of subnational constitutions, let's look at the major requirements for such constitutions. In some cases, federal units are established based on legal documents that are not necessarily called constitutions, e.g. in Spain the term "autonomy statutes" is used. Therefore, scholars felt the need to define when the term 'subnational constitution' would be appropriate. Subnational constitutions are constitutions of subnational entities, e.g. federal units. They exist under the umbrella of a central/federal/national constitution. (In the following, central constitution, federal constitution or national constitution is used interchangeably).

Federal units can be considered as having constitution-making power resulting in subnational constitutions if three criteria are fulfilled[51]:
- subnational units are relatively free to decide on the organization of their political institutions and governance processes;
- subnational constitutions are regarded as supreme in respect to other subnational law;
- and subnational constitutions are adopted by subnational unit, i.e. endorsed by the subnational citizenry e.g. through a decision by the subnational parliament or a subnational referendum.

First criterion: constitutional space. The first of the criteria concerns the constitutional space that is available to federal units for crafting their own constitutions. In the older federations, federal units tended to have far more constitutional space to define their own organization than federal units in newer federations. While older federal constitutions have hardly any provisions that concern the organization of the federal units, newer federal constitutions tend to be much more explicit. For instance,

- The constitution of Switzerland, one of the older federations, is almost mute on the organization of federal units. Federal units must define their

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51 Jonathan L. Marshfield, 2011, Models of Subnational Constitutionalism, Penn State Law Review, Vol. 115:4, p. 1152-1198 (with further references).

political institutions and governance processes and thus need their own constitutions.

- The constitution of India, one of the newer federations, defines the political organization of its federal units. The federal units cannot just deviate from this mandated organization. With the exception of Kashmir, they do not have the right to adopt a constitution.
- The constitution of South Africa, also one of the newer federations, takes a middle path. The South African constitution includes a whole chapter on the organization of federal units, however, federal units can opt out of this organization by drafting their own constitution. Thus the chapter in the South African constitution forms a constitution for federal units unless and until they draft their own subnational constitution.

The constitutional space is never unlimited. Having the right to adopt an own constitution does not mean that the federal units can do whatever they want to do. The right to draft an own subnational constitution is not like issuing a blank check. The central constitution and the courts can impose limitations and establish requirements in respect to the subnational constitutions. For instance, in South Africa while federal units can deviate from the model organization proposed in the national constitution they still have to respect the major values incorporated in the national constitution. In Switzerland the subnational constitutions must be democratic, they must be amendable if a majority of the subnational citizenry demands so and they must not infringe on the rights of other subnational entities. As another example the German Basic Law establishes a number of requirements for its sub-national units the Länder:

Article 28 [Land constitutions …]
(1) The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. … (3) The Federation shall guarantee that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

In addition, also other provisions, like for instance non-discrimination provisions limit the organizational options of federal units. Many federations guarantee the free movement of persons, goods, services and capital and prohibit federal units to discriminate against citizens from other federal units.

Limits are enforceable. The limits to the constitutional space tend to be enforceable. In South Africa, the Constitutional Court checks whether the subnational constitutions are in line with the national constitution, in Switzerland it is the federal parliament.

Constitutional space often underutilized. Experiences also suggest that in several countries the constitutional space provided to federal units remains largely underutilized. In South Africa – as well as in Canada – federal units did not make full use of their constitutional space. Today only one federal unit in South Africa and one in Canada have their own subnational constitution.

Second criterion: Supremacy of subnational constitutions. The second of the criteria points to the supremacy of subnational constitutions in relation to other subnational law.

- **Limited to the subnational sphere.** The required supremacy is limited to the subnational sphere, in different words to other legal acts passed by the subnational parliament. Subnational laws have to be in line with the subnational constitution.
- **National constitution supersedes.** The supremacy of the subnational constitution in respect to subnational laws does not exclude that the national constitution can override provisions in the subnational constitution and is regarded as the supreme law of the land. The Constitution of Mexico includes a very clear provision in this respect (Art. 133):

This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of

any contradictory provisions that may appear in the constitutions or laws of the States."

In a conflict between the national constitution and the subnational constitution the national constitution prevails.

- **National legislation supersedes subnational legislation.** In addition, federations are based on a hierarchy of norms that conveys a higher status to national legislation than to subnational legislation (including to subnational constitutions). Nevertheless, there can be cases when subnational law prevails. For instance, courts might rule national legislation that does not respect the constitutionally guaranteed distribution of powers, for instance because it infringes on powers of federal units, as unconstitutional. If the national legislation is unconstitutional in light of the national constitution the subnational legislation might prevail.
- **Concurrent powers.** In this respect also concurrent powers can be of interest. Concurrent powers are powers that can be assumed by the centre or by the federal units. In almost all federations central law prevails. However there can be exceptions (like in Canada and Iraq). Exceptions should be explicitly provided for in the national constitution.

Third criterion: Subnational constitution-making. The third criterion is directed at how subnational constitutions come into existence. In order to be considered a subnational constitution, its legitimacy is supposed to derive – at least to some extent – from the subnational citizenry, either directly in the form of a referendum or indirectly through subnational political institutions. In different words, the subnational constitution must not be 'given' by the national level. However, the national level can be involved in its elaboration, as guarantor of such subnational constitutions as well as in a certification procedure to establish its compatibility with the national constitution.

Merits and demerits of subnational constitutions. There is some debate on the merits and demerits of subnational constitution making. As has been shown above, federal units – if at all – have a far more limited constitutional space than independent countries. Their constitutions are under a national constitution and have to be in line with this national constitution. The country, through its national constitution decides how much space it wants to provide to its federal units for defining the organization of and the governance within the federal units.

Reasons in favor of subnational constitutions. Several reasons are normally brought forward for allowing federal units to adopt sub-national constitutions:

- Drafting a subnational constitution provides an opportunity for the population of the federal unit to express its identity, its values and preferences. This provides a right to self-determination to the populace of the federal units within clear, constitutionally established limits - and avoids that the structure of federal unit institutions is experienced as imposed.
- By providing federal units with some constitutional space they can develop institutions that are adapted to the local circumstances. It allows for different institutions to develop in line with the existing ground realities. Federal units can become a testing ground and pioneers for different organizational forms and reforms. This might make countries more resilient to (political) crisis.
- The process of drafting a subnational constitution can be a democratic experience for the populace of the federal unit and help to entrench constitutionalism at the level of federal units.
- As the subnational constitutions must be in line with the national constitution, subnational constitutions can serve as an affirmation of the values of the national constitution. The drafting process can help to engrain such national values at a subnational level.
- Asking federal units to draft their own constitutions can be used as a compatibility test. For instance, in Switzerland the aspiring Canton of Jura had to draft a constitution so that the Swiss citizens could assess whether they would accept Jura as an additional canton. Similarly, territories in Australia would have to draft and adopt a constitution – in line with the Australian constitution before becoming allegeable as federal unit.

Arguments against subnational constitutions. The following are arguments against allowing the right to draft subnational constitutions
- In particular, governments of countries with strong identity movements or even secessionist

movements shy away from providing federal units the right to draft their own constitutions, amongst others because of the symbolism in having an own constitution.

- Not all countries are in favor of having different institutional and governance structures at the subnational level. Such differences might make it more difficult for citizens who move from one federal unit to another to integrate and to actively participate in the democratic processes at their new place of residence. In addition, coordination and cooperation mechanisms between the centre and federal units as well as among federal units must be flexible enough to accommodate different decision-making procedures within federal units. However, even in countries in which federal units can have their own constitution, federal unit institutions often resemble each other.
- Federal units might lack the capacity or the will to draft their own constitutions. Sub-optimal constitutions can have negative implications for governance processes within the federal unit. In addition, drafting subnational constitutions takes time, which might prolong the implementation process of an overall federal system.

Middle ways? The question of sub-national constitution seems to be a typical either-or set-up with the consequence that one side will have to give in. However, even on this topic some middle ways are possible when reframing the debate by looking at the different involved interests. International practice shows some avenues that can be pursued, depending on the concerned interests that shall be balanced, for instance the South African approach that combines a centrally provided organization of federal units with the options to adapt such organization, ensures some possibility for federal units to organize themselves. Federal units could receive a constitutionally-guaranteed right to adapt their organization even if they do not have the right to a subnational constitution. Procedures of aligning subnational constitutions with values in the national constitution can help to safeguard national sovereignty and the rights of other federal units. Using a different term than constitution might address some of the more symbolic concerns while still allowing for identity expression of federal units.

In conclusion. Federalism does not automatically ascribe federal units with the right to draft their own constitutions. Some federations allow subnational constitutions while others do not. Providing federal units with the right to draft and to adopt a constitution does not provide complete discretion and organizational freedom. The national constitution defines the constitutional space of federal units by providing the framework within which federal units can make their own choices. Establishing minimum requirements for subnational constitutions that have to be abided to by all federal units as well as the establishment of certification processes for subnational constitutions can mitigate some of the potential demerits of subnational constitutions. An optional right to draft an own constitution and to adapt the set of subnational institutions – like South Africa introduced – can address differences in capacity as well as in political will. If done properly, subnational constitutions can become a tool to express specific preferences on the one hand and to consciously affirm national values on the other. It is the choice of each country whether and to what extent it wants to leave it to the federal units to define or adapt their own organization and governance processes. Federalism can work with or without. However, federalism presupposes two things: that all levels and spheres of governance adhere to the national constitution and that they respect the outcomes of democratic decision-making at all levels as long as it is within the provided constitutional space.

Questions:
- What are the interests behind demands for an own subnational constitution/against such constitutions? In how far can these interests only be safe-guarded by allowing/prohibiting subnational constitutions or are there alternative ways?
- In how far shall federal units have the right to define their own political institutions? What kind of general principles do they have to follow, e.g. democratic organization, protection of minorities?
- If the national constitution provides for the organization of federal units, shall these have the right to opt out/adapt the organization to their needs?
- What is the role of the centre in certifying, approving sub-national constitutions?

For the external supporter:
- The decision whether to have or not to have subnational constitutions is entirely up to the concerned country. Subnational constitutions are not an essential feature of federalism.
- Depending on the dynamics of the debate, most effective support might be to share international experiences, and, if needed and appropriate to support stakeholders in reframing the debate by exploring interests and the variety of ways to address, balance these interests with and without subnational constitutions.

CHAPTER 13: DO FEDERAL UNITS HAVE A RIGHT TO SELF-DETERMINATION?

Right to self-determination - often contentious. International law enshrines the peoples' right to self-determination. Several constitutions name the right to self-determination as basis of the country's independence, e.g. Croatia and Belarus. Some constitutions guarantee or acknowledge their peoples' right to self-determination, e.g. Ethiopia and South Africa. Furthermore, there are also a number of current conflicts in which the right is evoked, e.g. btw. Morocco and Western Sahara. In several cases, groups demand that the right to self-determination is enshrined in the constitution. Sometimes it is even argued that self-determination is part of federalism. Such demands can face heavy opposition, fearing that the right to self-determination will be detrimental for the survival of the country. The inclusion of the right to self-determination in a peace agreement, outcome paper of a national dialogue process or the Constitution and its relation to federalism is often heatedly debated. Therefore, a closer look is merited.

Legal interpretation of the right evolved and is not uniform. The legal interpretations of who has the right to self-determination and what this right shall and does include differ depending on the historical era, the context and the parties concerned. For instance, the legal interpretation of the right is a different one in the context of de-colonialisation than in other contexts.

External and internal right to self-determination. Most contested are interpretations when the right to 'external' self-determination is at stake, meaning the right to secession and independence, because in these cases the right to self-determination can be in tension with state sovereignty and integrity. Less controversial is the right to 'internal' self-determination: the right of peoples to effectively participate in governance. Some scholars argue that the right to self-determination has different implications in federal than in unitary countries. These arguments have to receive our special attention.

Right to self-determination – beneficial or harmful? Not only the legal interpretation can be disputed, in addition, opinions strongly differ whether the right to self-determination is beneficial or harmful to peace, whether it is a natural right or a (un-)necessary evil. Even if in a specific case the interpretation is mutually accepted, e.g. in the sense that there is no right to secession, opinions might still diverge regarding how to deal with secessionist demands when they nevertheless arise. Even when there is legal clarity there can still be controversy on political and perhaps even military implications. Shall for instance secession be prevented by military force?

Issues to be further considered. To explore all these issues, let's first consider why peoples or regions evoke the right to self-determination. Then a look will be taken at the legal perspective: on the one hand, the international law perspective, and on the other hand, the domestic law perspective. Afterwards a special look shall be taken at the relationship between federalism and the right to self-determination. Finally, in the form of conclusions, the questions shall be posed whether federal units have the right to secede based on the right to self-determination and how federal countries can deal with demands of secession.

Why is the right evoked? It is difficult to generalise why peoples or regions have evoked the right to self-determination. However, in all cases, it will need arguments in order to mobilise the peoples or regions for the sake of self-determination. The most powerful arguments are always those, which can be supported by emotion and by reason – by the heart and the mind.

Reasons and emotions. Secession, as the most far-reaching form of self-determination, can demonstrate this very clearly. Secession shall bring full recognition as independent nation and the possibility to determine the own destiny without interference by others. Advocates of secession tend to appeal to the group identity and build up emotions.

In addition, they aim at providing reasons why it is better to seek independence than to remain part of the country at stake. These arguments do not exclude that the advocates of secession might have other motivations, too, e.g. they might strive for more personal power and better access to resources. No matter what kind of individual motivations the elite has they will have to provide reasons to their followers why they shall engage in the risky endeavour of seeking secession. It will very much depend on the context what types of arguments are available and therefore will be used. For instance, a long history of exclusion and marginalisation can serve both as argument of emotion and of reason. The experience of exclusion can lead to building an identity that is distinct of the identity of the general population. The experience of long-term marginalisation can provide the basis for arguments that the group will be better off in a state on its own.

Arguments that tend to be used. Lack of recognition, lack or representation, lack of rights or lack of self-rule are brought forward by those in favour of secession. Therefore, the recognition of groups, their involvement in central decision-making and some rights to self-government, a good protection of their rights can help to prevent secessionist movements. When a specific group identifies with the state and the nation, when it effectively participates in governance at the centre or/and in its region of settlement, when its rights and the rights of its members are well protected it will be difficult for the leaders of this group to convince them to seek secession.

The right to self-determination in international law. The understanding of the right to self-determination based on international law evolved decisively.

- **As a guiding principle.** In the earlier times (from World War I until the 1960s), the right to self-determination was mainly used as guiding principle. After World War I, the victorious powers carved up the Austrian-Hungarian and the Ottoman Empires into different countries based on this principle, attempting to establish more or less ethnically homogeneous territories. In different words, they created separate states for different ethnically defined peoples. In 1945, the peoples' right to self-determination was included (again as principle) in the Charter of the United Nations.
- **As a right, mainly for colonies.** Then, in the year 1966, a shift occurred: Both Art. 1 of the UN In-

ternational Covenant on Economic, Social and Cultural Rights and of the UN International Covenant on Civil and Political Rights enshrined the peoples' right to self-determination, using identical formulations: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*" (Art 1, para 1). In the years following the adoption of these two covenants the right to self-determination was mainly understood as a right of colonies to independence. The different colonies were looked at in their entirety, conferring the right to the populations of these territories. Especially in Africa during the decolonialisation process, colonial boundaries were hardly ever changed but were taken as a given, no matter how arbitrarily they had been drawn. But the formulation in the two covenants allow several interpretations and leave open two major questions: who qualifies as a people and what does it mean to have the right to determine the political status?

- **Who qualifies as "people"?** There is still no full agreement as to who is or are the *people* holding the right. Is it the people in the ethnic sense (in line with the dominant interpretation of the pre-1966 principle) or the populations of already existing territories (in line with the decolonialisation practise)? Can minorities be defined as peoples? Neither the covenants nor other international legal documents provide a clear answer to the question, who is the bearer of the right to self-determination.
- **What does "political status" mean?** Also the term '*political status*' leaves room for interpretation. Does it include a right to secession and an own state? Especially such broader interpretations bring the right to self-determination in tension with the right of the state to territorial integrity. However, the First Protocol to the Geneva Convention of 1977 on victims in international armed conflicts, in particular Art. 1, para 4 implies such a broader interpretation. It puts the fight for self-determination against a colonial power on equal footing with the fight against a racist regime. In both cases conflicts can be treated as international conflicts, thus those who are fighting against a racist regime are treated like a state in their own right. This seems to sanction secession. However, the context makes it clear, not every

kind of a revolt against a repressive regime will trigger such far-reaching consequences.

- **Practise based on international law not uniform.** The custom of the United Nations and the international community in relation to the right to external self-determination is not uniform. Whereas in some instances of new state formation the right to self-determination of an ethnic group was implicitly recognized, in other instances the right of similarly situated groups to their own state was denied or at least not supported.

- **General rule: no right to external self-determination.** However legal interpretations and customs indicate: International law does not provide a general right to external self-determination. The right to independence remains the big exception. Scholars like Hurst Hannum argue that in addition to some remaining cases of colonialisation, the right to secession can only be affirmed if a group or community has had to face massive discrimination approaching genocide or in some extreme cases if the group or community has been systematically excluded from political and economic power and when a minimum level of minority rights and self-government have been consistently denied. And Hurst Hannum continues to argue that whenever a group obtains independence based on the right to self-determination, other groups within their territory should have an identical right[52].

- **Mainly right to internal self-determination.** What however does the peoples' right to self-determination include if it does not include independence? The 2007 UN Declaration on the Rights of Indigenous Peoples proclaims the right to self-determination for indigenous peoples and clearly defines the underlying understanding of the term for the specific context: "*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions* (Art. 4)". The Declaration adopts a notion of internal self-determination. Internal self-determination can include the right to political participation, autonomy or self-government. In most contexts today, the right to self-determination will have to be understood as the right to internal self-determination, thus as a right to political participation, autonomy or self-government.

The right to external self-determination in domestic law. International law does not provide a general right to external self-determination. But international law does not prohibit secession either.

- **Constitutions can provide for external self-determination.** Countries can provide such a right to their people or peoples and can explicitly or implicitly allow secession. Ethiopia and St. Kitts and Nevis are probably the only countries that explicitly provide the right and a specific procedure for external self-determination in their constitutions. In Ethiopia "*Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession*" (Constitution of Ethiopia of 1994, Art. 39 para 1). In St. Kitts and Nevis, according to Art. 113 para 1 of the Constitution "*The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher [St. Kitts] and accordingly that this Constitution shall no longer have effect in the island of Nevis*". In both countries, the constitutions establish relatively detailed provisions how secession can be achieved.

- **The Court.** Canada did not provide for a right to secession in its Constitution but the highest court, the Canadian Supreme Court nevertheless established some rules of procedure for the possible secession of Quebec.

- **In interim arrangements.** The right to self-determination as secession was also provided in interim arrangements. For instance, according to the Comprehensive Peace Agreement of 2005, Southern Sudan had the right to decide in a referendum whether to stay with Northern Sudan or claim independence. In 2010, South Sudan opted for independence.

- **Less explicit references.** Other countries do not go so far. They mention the right to self-determination but the constitution remains vague whether there is a legal option for secession. For instance, South Africa acknowledges the right to self-determination of the people of South Africa as well as of other communities: "*The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage,*

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52 Hannum, Horst, 1998: The right of self-determination in the twenty-first century, Washington and Lee Law Review

within a territorial entity in the Republic or in any other way, determined by national legislation" (Constitution of South Africa of 1996, Section 235).

- **Constitutions can prohibit external self-determination.** While some countries explicitly allow or acknowledge a right to self-determination, other countries explicitly guarantee the indivisibility of the country and thus implicitly prohibit secession. The most famous formulation stems from the French Constitution: "*France is an indivisible, secular, democratic, and social Republic…*" (Art. 2). A similar formulation can be found in the Constitution of Turkey: "*The Turkish state, with its territory and nation, is an indivisible entity…*" (Art. 3). Art 4 even decrees that Art 3 must not be amended. Countries can prohibit secession as long as there is no internationally guaranteed right to it.
- **Most countries do not regulate external self-determination.** A majority of countries remain mute on the question. However, principles of internal self-determination, such as participation, autonomy or self-government, got incorporated into many constitutions. Federalism and decentralisation are two examples how autonomy or self-government can be guaranteed. Cultural rights for minorities, special representation at the centre or also proportional representation are other elements that can promote internal self-determination of groups and communities.

Relationship between federalism and the right to self-determination? What is the relationship between federalism and the right to self-determination? In principle, international law does not distinguish between unitary, federal or confederal states. Identical rules apply to all states, no matter what kind of territorial organization they adopt. The equality of states is one of the fundamental principles of international law. Therefore, the interpretation of the right to self-determination should not differ whether unitary or federal countries are concerned.

- **In principle, no right to external self-determination.** Thus it is also valid for federations: In principle there is no right to secession unless domestic law provides it.
- **Mainly right to internal self-determination.** Peoples have the right to demand participation in governance and some degree of autonomy or self-government within the state in line with the right to internal self-determination.

- **Federalism as good tool to provide for internal self-determination.** There are strong arguments that federalism can be a good tool to provide internal self-determination. Based on the shared rule principle, federal units participate in central decision-making, based on the self-rule principles they have own decision-making competencies. Federalism can be used to ensure political participation of federal units or groups in central decision-making as well as self-government within the federal units. In fact, in many cases, federalism is introduced in order to improve internal self-determination.
- **Effective federalism as argument against a right to external self-determination.** In line with the current interpretations of the right of external self-determination, secessionist movements will have more difficulties to claim the right to external self-determination if they can determine their fate according to their preferences within the federation.

Confusion introduced through expression: 'federations in dissolution'. However, advisory opinions during the break-up of Yugoslavia created some uncertainties[53]. In a much criticised and crucial passage in his opinion, the President of the Badinter Arbitration Committee basically argued that in federations, central institutions represent the components of the federation. Thus if federal units seize to participate in central institutions and withdraw their allegiance, the state can be considered in dissolution. According to his view, once the state is in dissolution the federal units can decide whether they want to form a new union or continue on their own. Based on his arguments, four republics of Yugoslavia (Slovenia, Croatia, Bosnia and Herzegovina and Macedonia) were allowed to part from Yugoslavia and form independent states. By introducing the category of 'state in dissolution' he managed to avoid using the concepts of secession or external self-determination. It can be argued that the Yugoslavian case was special because four of the six republics had expressed their wish to depart from Yugoslavia. The consequence of his argument, if used in other contexts, however would be, that federations were more vulnerable than unitary states because federal units could revoke allegiance unilaterally and thus

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53 Opinions of the Arbitration Committee, available at http://77207.57.19.226/journal/Vol3/No1/art13.html

start a process of dissolution. There are counterarguments to the Committee's reasoning. For instance, it can be argued that federations do not only base their legitimacy on the representation of federal units but also on the representation of all citizens and that thus dissolution would have to be agreed on by the federal units and the citizens. If his view was taken as representing the current stance of the international community, this would weaken the territorial integrity of federations. It is doubtful, that the view of the Badinter Arbitration Committee will be generally adopted.

The reasoning of the Canadian Supreme Court. A constructive approach was taken by the Supreme Court in Canada concerning the right to secession of the Province of Quebec. The court also used federalism as part of its argument. The court argued "*Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province 'under the Constitution' could not be achieved unilaterally, that is without principled negotiation with other participants in Confederation within the existing constitutional framework. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order*[54]*.*" The court concluded that if a clear majority in Quebec decided in favour of secession, Canada would have to enter into serious negotiations with Quebec. Quebec on the other hand would have to respect the rights of others, in accordance with the principles of federalism, the rule of law and the rights of individuals and of minorities.

In conclusion. The following sums up the main conclusions in respect to secession, the controversial form of external self-determination.

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54 Supreme Court of Canada, Reference re Secession of Quebec (1998) 2 S.C.R 217, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html

- **Do federal units have a right to secession?** In history some federations gave a clear military answer to the question. Both Switzerland (1847) and the United States (1861–1865) fought a war when some of the federal units wanted to depart. In both cases the territorial integrity was preserved and secessionist tendencies were suppressed. And still today, despite the Badinter opinions, it can be argued that as a rule federal units do not have a right to secession, unless domestic law provides such a right. Ethiopia and St. Kitts and Nevis established a right to secession directly in their constitutions. The Canadian Supreme Court established a duty of Canada to seriously negotiate on secession if a clear majority in Quebec expressed its will to depart.
- **How to deal with secession in the constitution?** Some scholars argue that it is advisable that countries regulate the conditions and procedures for secession either in the constitution or in other legal documents. The reasoning behind this argument is more pragmatic than rights based. They argue that it is better to establish accepted rules for the worst case during times of peace so as to have a procedure in place. They estimate that this can limit the risk to plunge into war or to be faced with strong international interference when demands for secession come up. The procedure can provide for a controlled and principled way of secession and can even impose certain conditions, e.g. no unilateral secession or guarantees for minorities. Others fear that provisions in the constitution might encourage secessionist movements. There have been several examples when the possibility to separate after a test was included in a sunrise clause, e.g. separation could be demanded ten years after the signing of the peace agreement or the promulgation of the Constitution. Recent experiences of such test periods of continuing to live together were not successful. No side had strong incentives to invest in making the common state successful (see e.g. the experiences of Sudan and South Sudan or of Serbia and Montenegro).
- **How to react to a demand for fulfillment of the constitutional right?** However, even if there is a right to secession and a procedure provided in the constitution it is hard to predict what kind of political dynamics will develop, once a part of the country actually decides to secede. It is not clear how for instance Ethiopia would react if demands for secession actually came up. There

are several examples, where possibilities for leaving the country had been initially provided but have later been unilaterally abolished, e.g. in Burma after 1947. Political pressures and emotions to maintain the integrity of the state can understandably be very strong. Similarly, it is also not clear how to react if the constitution is mute or even prohibits secession but secessionist demands still come up. The legal arguments will probably not stop proponents of secession. Countries will then be faced with the challenge how to enforce the (legally guaranteed) indivisibility of their territory. Shall they use force and risk an internal war or shall they let go of the territory after all? If they decide to let go, what procedure shall be used for the secession? Will the strength of weapons decide on the boundary line or will it be possible to decide on principles and procedures? A prohibition in the constitution cannot prevent that secession is demanded and that force is used to achieve independence. In addition, strong state repression in order to prevent secession will strengthen the moral (and perhaps even legal) arguments of proponents of secession and will probably bring their movement new adherents. Governments are in a dilemma.

- **Will federalism contribute to secession?** No matter what legal approach is adopted in respect to external self-determination the best strategy of course remains not to give reasons for secession. And here internal self-determination can provide an important instrument to counter these reasons/arguments. The possibility of recognition, political participation, autonomy and self-government for communities and peoples within the state can increase the identification with the state and thus might limit demands for secession. Federalism can here be an effective conflict prevention tool that can provide political reasons to remain. Additionally, the provision of internal self-determination will strengthen the legal and moral arguments of government that secession is not permissible or the adequate solution. In the end, how to prevent and to react to secessionist demands will never just be a legal question. It will always also remain a political and moral one.

Questions
- Are there demands for the right to self-determination? Why?

- What do different stakeholders understand by the right to self-determination? Do proponents claim a right to secession or to more political participation and self-rule? If they want a right to secession, is there already a secessionist movement or does the group want to keep the option open for the future?
- What do reactions to such demands look like?
- Are there any grounds in international law that would support a right to external self-determination (decolonialization or massive suppression)? Is there a legal basis in domestic law, supporting or prohibiting secession?

For the external supporter
- When the term self-determination is used, make sure that there is a uniform understanding of the meaning. In particular, make a clear distinction between self-rule as part of federalism and self-determination as well as between external and internal self-determination.
- Reframing the debate, back to underlying interests might be more productive than entering into a categorical debate.
- In general, any engagement by external supporters associated with 'support' to secession can easily be perceived as interference in state sovereignty. Any such engagement should be based on a clear mandate, by the government, or the UN, e.g. to explore process options. Consider the overall impact secession can have, explore safeguards for new minorities as well as alternatives to secession.
- On the question of including the right to self-determination in the Constitution, carefully explore the interests of the different groups. If such a provision is mainly requested for face-saving, formulations like in South Africa might be a feasible way to accommodate different stakeholders.

CHAPTER 14: **WHEN DO FEDERATIONS FAIL?**

Federalism – a way towards state failure? In federalism debates there should always also be a reflection on failed federations and the reasons why these federations failed. Often, the failure of federations is brought up by opponents but the issue is of importance for opponents and proponents alike in order to be able to identify potential factors that could contribute to a failure of the emerging federal system. There are a number of factors that might contribute to state fragility, despite or because of federalism. Some of these factors can be influenced, others cannot.

Federalism introduced too late. In particular in some recent attempts to go for federalism, federalism was brought up because a group or the population of a region seriously challenged not only the regime but the state as such. In these cases, federalism was seen as a potential mechanism to 'save' the integrity of the country and to avoid secession and disintegration. The majority embraced federalism as the lesser evil. Groups advocating for federalism sometimes saw federalism as a path towards quasi-independence. They saw federalism as the second best option (to full-fletched independence). It is not surprising that quite a number of these attempts failed. Federalism was brought up (too late) when the unity of the country was already questioned and the loyalty of different groups towards the country was eroded. Federalism was not necessarily able to rebuild unity and recreate loyalty towards the state (e.g. Sudan and South Sudan).

Given factors, in particular overlapping or cross-cutting diversity. There are federations which are geographically huge and others that are tiny. Some of the most populous and some of the least populous countries of the world adopted a federal organization. Size therefore does not really matter. However, there are factors outside of the control of politicians and populations that can influence the success of federations. Comparative studies helped to identify certain stress factors for federations, see in particular studies by Ronald Watts[55]. The most important 'given' stress factor is the distribution and character of internal social divisions[56]. It does not so much matter how ethnically, religiously or culturally diverse a society is but much more on the type of cleavages. In general, cross-cutting and overlapping cleavages are distinguished. In cases of cross-cutting cleavages, different groups are distinguished by certain identity factors but at least some parts of the different groups also have certain identity factors in common, e.g. they speak different languages but have the same religion. On certain issues, coalitions of interest will emerge along language identity on other issues along religious lines. Switzerland is a typical example of cross-cutting cleavages. E.g. some French-speaking Swiss are catholic others are protestant, the same for German-speakers. On some issues coalition will develop along language lines on other issues however along religious lines. In other cases, coalitions will form around rural - urban lines. Cross-cutting cleavages prevent that always the same groups oppose each other, which would foster competition and division. In cases of overlapping diversity, all relevant identity factors are distinct, e.g. the communities speak different languages, have a different religion, follow different cultural traditions and belong to different social classes. This increases the risk that on many issues communities will have different opinions and that political mobilisation is predominately along ethnic/identity lines. The category 'we' and 'our political opponents' in political discourse will coalesce with 'our community' and 'others'. In these cases, it can be difficult to maintain and promote a national identity.

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55 See, e.g., Watts, Ronald L., 2008: *Comparing Federal Systems,* 3rd ed. Montreal: McGill-Queen's University Press, p. 179-192.

56 On stress-factors, see Watts, Ronald L., 2008: *Comparing Federal Systems*, 3rd ed. Montreal: McGill-Queen's University Press, p. 180-181.

Figure 8: Cross-cutting and overlapping cleavages

Internal Social Divisions
crosscutting differences

Internal Social Divisions
Overlapping differences
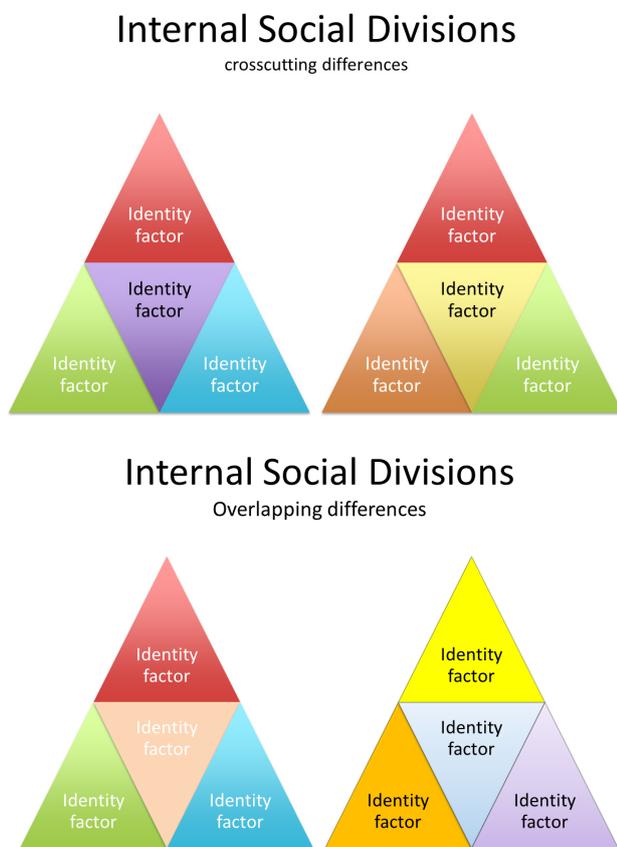
Source: Nicole Töpperwien

In the case of the cross-cutting cleavages in the first picture the common red identity factor can unite. In the second picture there are no visible common identity factor.

How one can turn into the other. It is difficult (but not impossible) to mimic cross-cutting diversity in a case of overlapping diversity. Institutions must be flexible enough to allow and encourage different factors and motivations for political mobilisation. In addition, identities are not static. Ideology can become a cross-cutting factor that balances otherwise overlapping diversity. On the other hand, it happens relatively often that cross-cutting diversity starts to resemble overlapping diversity promoted by the institutional set-up and connected policies. This can happen in two ways: either by consciously excluding or by particularly promoting one factor of identity for political mobilisation.

The exclusion of one factor of identity can lead to resistance, e.g. when one community experiences the exclusion as the indirect dominance of others. The promotion of one factor of identity for political mobilisation is seen in many ethnic federations.

For instance, veto powers for linguistic communities can provide an incentive to mobilise the linguistic community on various issues if this is the most effective way to block a decision. Providing a high degree of relevance to one factor of identity will make other factors of identity politically less important. Both policies can have the effect that cross-cutting diversity can no longer lead to changing coalitions of interest. This will in the end increase the feeling of difference within the population - and can weaken the fabric of national identity. Overlapping diversity is in particular a risk if there are only few communities or if there are important differences in population size or in might between different communities. If there are many, more or less equally influential communities, changing coalitions of interest between different communities can emerge and can have similar effects like cross-cutting diversity.

Type of federalism and governance system. In addition, there are risks in specific forms of federalism. There are a number of federations that failed and dissolved, e.g. Czechoslovakia or Yugoslavia. In these countries the particular type of federalism and governance was part of the problem. Ronald Watts identifies stress-factors in federation that arise (1) from structural or institutional choices, (2) policies for dealing with diversity and (3) political processes[57].

- **Structural and institutional choices.** There are only few options in respect to the territorial organization that can be defined as problematic. International experience shows that federations with two or three federal units tend to be unstable, as well as with huge discrepancy between federal units, e.g. in population, power or wealth tend to jeopardise stability (see Chapter 8). The demarcation of federal units based on settlement patterns of communities can but need not be a stress factor. It mainly develops into a stress factor if members of other groups feel threatened or if it leads to entirely group based political mobilisation. Structural or institutional stress factors can also arise in the form of extreme under-representation and lack of influence of groups in central institutions (East Pakistan, Jamaicans in the West Indies Federation), politi-

57 On stress-factors, Watts, Ronald L., 2008: Comparing Federal Systems, 3rd ed. Montreal: McGill-Queen's University Press, p. 179-192.

cal institutions that exacerbate internal divisions, e.g. by solely encouraging mobilisations along specific identity factors (Bosnia Herzegovina), the emergence of primarily regional parties instead of umbrella parties (Czechoslovakia, Serbia and Montenegro, Belgium) and even the lack of implementation of the federal design (Malaysia).

- **Policies for dealing with diversity.** There are two main approaches for addressing demands by groups and for opposing disintegration: (a) to reinforce the strength of the centre in order to resist disintegration while promoting assimilation strategies. In many cases, such strategies reinforced conflict, e.g. exclusive language policies, or (b) to accommodate pressure, e.g. by providing additional powers to federal units, or by the creation of new federal units. These policies of accommodation sometimes led to a drifting apart of federations e.g. Serbia and Montenegro. Combined policies (the reinforcement of the centre and the accommodation of major grievances) are more successful.

- **Political processes.** Finally, political processes in crisis situations have an influence on the stability of federations. The political process can only be influenced to some extent. Managing the political process necessitates restraint and respect for political institutions of all involved, including movements. Crisis brings the risk of a decline for the support of compromise, highly competitive and confrontational politics and disrespect for the political institutions and in the worst case resort to violence, state-sponsored or other.

Questions:
- What are overlapping, what are cross-cutting features of diversity?
- Does the (proposed) federal system re-enforce overlapping diversity or help to re-enforce or mimic cross-cutting elements?
- How can policies foster accommodation and promote a sufficiently strong centre?
- How does the system influence political mobilization? How flexible is the system? Can the grounds for political mobilization change over time? What are elements that provide for incentives/ opportunities to mobilize on different grounds?

For the external supporter
- Acknowledging risks of federalism increases credibility. Lessons can be drawn from successful and failed federations.
- While the given factors cannot necessarily be changed, effects can be mitigated. Even when the given factors promise to be conducive to successful federalism, institutions, policies and processes can erode positive effects.

CHAPTER 15: WHAT ASPECTS OF THE FEDERAL DESIGN DETERMINE HOW CENTRALIZED OR NON-CENTRALIZED A FEDERATION IS?

Shifting the power-balance. Federalism is normally introduced to change the power-balance: When it is introduced in the context of a unitary state then federalism tends to be introduced with the objective of providing more powers to a middle level of governance. This merits exploring what aspects of the federal design as established in the constitution, determine whether such a shift of power from the center to federal units really takes place.

Distribution of powers. The most obvious indicator is the distribution of powers. The constitutionally established distribution of powers determines the areas in which federal units are in charge. A long list of exclusive powers is an indication for substantial decision-making space for federal units. A long list of concurrent powers might also enhance powers of federal units, however, there the effective extent of powers for federal units depends on the discretion of the center. The more comprehensive the center legislates the smaller the decision-making space for federal units. In some cases, the federal units have the possibility to give power back to the center, for instance if they do not feel capable of assuming the power, or they can request the center to prepare legislation for them. In these cases, the federal units limit their own decision-making space.

Resource allocation. However, as already pointed out in earlier chapters, the allocation of powers is only meaningful if powers are matched with resources. Therefore, when assessing the extent of effective power of federal units, the federal unit's access to discretionary, non-earmarked funds is the even more important indicator. Ear-marked funds can be used to promote policies, thus limiting the discretion of federal units. Resources are therefore always the first factor to watch out for.

Right to self-organization. Connected to the distribution of powers is the right to self-organization. In particular the right to define the organization of the government and of the administration and to have an own civil service, to decide on hiring and firing, is an important aspect of own decision-making space. The administration and the staffing have to reflect the policy priorities of federal units. The pay-scale has to reflect the financial capacity of the federal unit. If the center is in charge of determining the organization of the administration as well as the pay scale, it can influence the policy priorities as well as the use of funds of federal units.

Possible interventions by the center. Intergovernmental relations are a key feature of federations and are needed for the effective functioning of the country. Intergovernmental relations tend to put a strong focus on coordination and cooperation. However, normally the center retains some rights to act and intervene, e.g. for safeguarding national security or for resolving disputes between federal units. In some federations, such powers are relatively extensive. In Nepal, for instance, the center has the power to legislate for the purpose of coordination. Depending on the interpretation of this power, this provision can lead to far-reaching interventions. In Switzerland, there is the possibility to mandate cooperation among federal units in some subject areas. In some federations, the center also has the power to dissolve state assemblies or remove the government. In such a case, the procedure for doing so and the reasons that can trigger such an intervention have to be carefully assessed.

Courts and other dispute resolution mechanisms. Strong courts can safeguard constitutionally guaranteed powers of federal units. However, the courts cannot protect federal units against legal interference by the center. Many federations provide for alternative dispute resolution mechanisms in order to avoid court procedures that produce winners and losers. In respect to alternative dispute resolution mechanisms, it will depend on the composition and the decision-making process of such a mechanism whether these can function as an impartial arbiter.

Other factors. There are a number of other factors that will determine how effective the federal unit's decision-making space is. For instance, the tradition of nation-wide political parties with strong party discipline can limit the effective decision-making space if the party gives directives to its members at the federal unit level. The party whip can have a particularly centralizing effect if there is a one-party regime. Also parallel power-structures, e.g. traditional institutions, can limit the effective powers of federal units.

Implementation matters. The transfer of powers to federal units will always require some time. Only with full implementation, with the transfer of powers and resources and the establishment of federal unit institutions and governance processes, the federal units will be able to fully assume their decision-making space.

Questions:
- Are there elements that allow the center to limit the decision-making space of federal units? What are these? Are there other factors that can have negative impact on the decision-making space of federal units?
- What kind of safeguards are there that the federal units have effective decision-making space?
- Do the different stakeholders have a clear understanding of the potential decision-making space and possibilities to enhance or limit such space?

For the external supporter:
- More powers for the federal units is not necessarily better. It is up to the country to determine how centralized or non-centralized it wants to be. For the proper functioning of a federation the center must not be too weak and at the same time federal units should have some substantial powers matched by resources.
- Re-centralization through the back-door, e.g. through extensive legislation in the field of concurrent powers or through legal intervention can however be a source of dispute, in particular if stakeholders had not been aware of the possible impact of certain provisions.
- External actors can support informed decision-making by promoting discussions that focus on potential interpretation of provisions and their impact.

IN CONCLUSION - AFTER THE DEBATE

Implementation is key. If federalism debates can be positively concluded this will have to lead to the adoption of a federal constitution or to the amendment of the constitution in order to constitutionally guarantee self-rule and shared rule. The Constitution, however, is only a piece of paper until it is implemented in word and spirit. The process of the federalism debates, in the best case, will have prepared the ground for implementation. Non-implementation can cause serious frustration with the risk that demands of frustrated groups increase. Therefore, it is useful to consider the implementation phase and transition early on. Considering implementation early has a triple benefit: assessing whether the agreement/provisions are implementable will increase its quality, it will contribute to expectation management because it will show how long the transition is likely to take, and it can make the actual implementation easier as for instance key implementation steps are already identified and agreed on. Experience shows that implementation from a unitary system to a federal one, until powers and resources are transferred tend to take seven to fifteen years[58]. The transition, until federalism becomes part of the political culture, can take longer.

Constitutional provisions impact on the transition process. The constitutional provisions will have an impact on implementation, in particular:

- **Does the constitution include all relevant provisions on federalism?** For instance, in Nepal it looked at times like the demarcation of federal units would not be included in the Constitution because parties could not come to an agreement. The Constitution of Iraq was promulgated without provisions on the second chamber of parliament. How likely is it that gaps can be filled within reasonable time?
- **Are there any provisions on federalism that remain contested?** If important stakeholder groups are opposed to federalism in general or if certain provisions related to federalism remain seriously contested it might not be feasible to implement federalism right away. It might need further debates and even amendments to the Constitution to move forward.
- **Are there ambiguous provisions in the constitution?** Sometimes 'creative ambiguity', provisions that can be read differently by different stakeholders help to come to an agreement on contentious issues, however such ambiguity might haunt the implementation process later on. The implementer or the courts will have to establish the meaning of the provisions – which can lead to renewed disputes. Sometimes ambiguities or inconsistencies are simple drafting mishaps, however also in these cases they can slow down the implementation process.
- **Does the constitution include a comprehensive set of transitory provisions**? In the ideal case, the constitution provides for comprehensive transitory provisions, including a timeline and sequencing of major implementation steps as well as mechanism for steering, coordination and monitoring. In case such provisions are not included, it can be expected that after the promulgation of the constitution, negotiations on the sequencing and prioritization of the different steps will have to take place and will slow down the implementation.

Complex process. The transition to federalism is a complex process, so complex that some scholars argue that preference should be given to other forms of state organization that are easier to implement.

- **Effective steering, coordination monitoring.** Any successful transition to federalism will need effective steering, coordination and monitoring with clear roles and responsibilities. The steering mechanism needs political involvement while coordination can be primarily done at the level of the administration though of course the indirect steering potential through coordination

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58 See for instance publications on implementation experiences at http://www.forumfed.org/programs/policy-and-research.

should not be underestimated. Monitoring can be provided by the executive and the parliament and/or by an outside actor. Kenya, for instance, established a Commission. In Nepal, parliament established one committee that shall weigh over constitutional implementation, including the implementation of federalism.

- **Multiple reforms.** The introduction of federalism necessitates multiple reforms. Many of the existing institutions that are expected to be drivers of federalism reforms have to undergo reforms themselves. For instance, the Executive (Ministries and the administration as such) will have to be reorganized to reflect the distribution of powers. At the same time, Ministries will have to develop the needed implementing legislation. Parliament will have to transform into a bicameral parliament. The organization of the Parliament Secretariat as well as the working procedures will have to be adapted accordingly. In addition, parliament has to promulgate the implementing legislation and has an oversight role in respect to the implementation of the constitution. Reforms might also concern the judiciary. In addition, the courts will have an important role in interpreting the federalism related provisions in the constitution and adjudicate federalism related cases.

- **Involving multiple institutions.** Many of the tasks need the involvement of multiple institutions. For instance, the transfer of powers will involve the concerned line Ministry for the main policy, potentially a Ministry of Law for the preparation of bills and the Ministry of Finance for funding decisions. The various issues are interlinked. For instance, the transfer of powers must be harmonized with the transfer of resources, assets and structures as well as human resources. Legislation is the vehicle to enable this process. Law-making is at the service of realizing the respective policies.

- **A growing number of actors.** Over time the number of actors will grow. At the beginning, until federal units are established, central institutions tend to be at the forefront however, as soon as possible, top-down approaches should be replaced by more cooperative approaches including all concerned tiers of government. Experiences of countries that transitioned to federalism show that it is expedient to give the lead to those institutions that are most interested in the federalism agenda whenever possible but that it needs the

interplay of the different levels of government. Participatory approaches can help to strengthen trust and build ownership.

- **Sequencing and timing.** There might be different preferences about the sequencing and timing of reforms.
  - When shall elections take place, at the national, federal unit and local level?
  - When will the implementing legislation be developed? When will the existent legislation be reviewed? Who is in the lead?
  - When will the administration, the civil service be restructured?
  - When will other institutions be restructured (courts, police, constitutional commissions)?
  - When is the transfer of powers and resources to the federal units going to commence? How will the transfer of powers and resources be sequenced?

- **Contentious issues can emerge.** The implementation process can bring new contentious issues to the forefront that might require further dialogue. For instance, in Nepal there is the risk that the determination of the capitals of federal units turns contentious.

In conclusion. It is not enough, to have a well-crafted agreement or constitution. The text has to be turned into reality. The provisions have to be implemented. Not everything can be achieved over night. It will need a step-by-step approach to create the institutions of federal units, conduct elections, to confer powers and resources and to include them into decision-making at the centre. The political decision-makers can increase the chances for implementation by already thinking of implementation and preparing an implementation schedule, outlining who will do what when with what kind of resources when they draft the constitutional provisions on federalism. If they do so, the implementation schedule can also be used as a reality check and as a tool to manage expectations. Federalism is supposed to create a balance of power. Such a balance can never be achieved once and for all. All federations went through processes of re-balancing, either through constitutional amendments or in the case of the United States of America through interpretation by the court. Changes to the context might require adaptations to the federal set-up. Furthermore, the implementation of federalism might show some imbalances that need correction.

Questions:
- In how far do stakeholders discuss the transition to federalism?
- What are expectations on timing, sequencing, implementation priorities? Are expectations shared? In how far are expectations realistic?
- In how far is the planned timing, sequencing and implementation priorities made explicit?
- What could be potential steering, coordination and monitoring mechanisms? Who has to be involved?
- Who shall be in the driver's seat for the different stages of the implementation of federalism? How can a potential roadmap look like?
- What can be conducive platforms of dialogue if parts of the implementation become contentious?

For the external supporter
- External supporters can function as a sounding board to detect potential incongruences and ambiguities in the text of the agreement or constitution.
- The last phase of coming to an agreement on federalism tends to be hectic. Transitory provisions and implementation schedules are often not high on the agenda. However, they have an important role in smoothing the transition process. External supporters can draw attention to transition and implementation related issues.
- A potential lack of clarity in relation to the implementation process including on the time-line and sequencing, responsibilities, and resources makes any planning of implementation support highly difficult. If there are in addition ambiguities, technical incongruities or gaps in the text of the constitution this will further increase challenges. If there is no clear transition plan, coming to an agreement on the sequencing and timing of the implementation as well as on other implementation related issues will most likely require political negotiations, some of them prolonged.
- The above suggests that support to implementation requires a very high level of flexibility, time- and resource-wise. In addition, support to the implementation of federalism is a long term process.
- Capacity-building and institution-building in general and with a specific focus on the institution's role in the transition can help to smooth implementation. Support to the political process might help to come to agreement on implementation related issues. In addition, the need for awareness-building and expectation management e.g. on the time required for implementation or on potential challenges should not be underestimated, otherwise public opinion might turn against the federal constitution.
- There are a variety of fields, support to federalism implementation can focus on, including Dialogue/facilitation on remaining contentious issues, on potentially emerging divisive issues; Support in respect to Coordination, Steering, Monitoring, Roadmap; Support to institutional reform at central level (e.g. Parliament, Courts, Public Administration Reform, Commissions, Police); Support for elections at the federal level; Support to institution-building and democratic governance processes at the federal level, including infrastructure support; Support the concretization and operationalization of multi-level

intergovernmental relations; Support for the alignment of legislation; Support for fiscal federalism, developing resource allocation, revenue sharing, equalization; Sector-wise support for the transfer of powers and resources, assets; Capacity and awareness-building, public outreach.

- As for any support, it is important to determine the objectives of supporting the implementation of federalism, such as: Improving chances that federalism will be implemented (rule of law); Supporting a peaceful, timely, informed, coordinated, inclusive and participatory transition process; Preventing gaps in service-delivery during transition; Supporting equitable development; Contributing to inclusive democratic governance at all levels, bringing decision-making closer to the people; Strengthening state institutions at all levels, improving governance processes in line with good governance principles.

- There are some general recommendations for external supporters to federalism implementation processes: Ensure that projects and programmes are in line with the new constitution and positively impact or at least do not negatively impact on constitutional implementation, including on the implementation of federalism. Support the constitution implementation process in a context-sensitive way, ensuring that the interests of all communities, majorities and minorities are taken into account. Encourage Government (and the main political parties) to build an effective and inclusive political steering mechanism that can give guidance in the implementation process and to build up comprehensive coordination mechanisms. Encourage the Government to develop a broadly consulted and supported roadmap for the implementation process with clear prioritization and sequencing of tasks that can be used to identify and coordinate potential support by development partners. Seek understanding among the main development partners who support the implementation of the Constitution on some common rules of engagement, ensure sharing of information and coordination.

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Annex 2: List of tables and figures

Annex 3: Questions on Federalism

All federal countries developed unique institutions. They got inspiration from other countries, e.g. Switzerland from the United States of America, however in the end every country came up with its own interpretation of federalism, based on past experiences, traditions and needs. The multitude of different options how to design the federal system is the main advantage. The table below includes a list of issues that might come up in dialogues on federalism as well as questions that might help to develop principles and options, which later can be translated into constitutional provisions. The list can be used as a tool and check-list to explore different options of federalism. An early version of this table by Nicole Töpperwien was already published in: Bishnu Upreti, Markus Heiniger & Nicole Töpperwien, Peace Process and Federalism in Nepal, Heidel Press for the South Regional Coordination Office of NCCR North-South, Kathmandu 2009.

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
Self-Rule Aspects		
1. Levels of government	- **How many levels** of government shall there be and why? Just the centre and the federal units or shall there be additional levels of government? - If there are more than two levels of government (centre and federal units), shall all levels of government be established and regulated directly in the constitution? - Or shall the level of federal units have the power to decide on additional lower levels of government, define their boundaries, transfer competencies and/or transfer resources? - Or shall there be a middle way – some basic mandatory or optional organizational rules in the Constitution as well as certain flexibilities for the federal units?	- *More than two levels of government can bring power closer to the people and might improve (internal) self-determination of smaller locally concentrated groups.* - *For instance, in Switzerland, the cantons decide on the organization of local government. In South Africa local governments as well as their organization are established in the constitution. India provides a mandatory minimum list of powers for local governments.*
2. Delimitation of boundaries of federal units	- Is it necessary to delineate federal units or are there existing units that can be turned into federal units? - What **criteria** shall be used (ethnic, linguistic, religious, geographic, historic economic, pre-existing administrative units, conflict potentials, others, combinations of these)? - Shall there be minimum requirements (minimum number of federal units, minimum number of population, minimum level of resources?), or maximum requirements (e.g. not more than 25% of population within one federal unit)? - Shall boundaries of federal units be **defined in the Constitution** or shall only criteria or a **procedure for establishing federal units** be included in the constitution? - What shall be the procedure for establishing federal units? Shall the population of prospective federal units have a say in the delimitation process? Shall minorities within prospective federal units have a say in the delimitation process? - Shall there be timelines in the constitution (transitory provisions) for deciding on the establishment federal units? - Shall the constitution include a procedure for changing boundaries of federal units, for establishing new federal units, for merging federal units?	- *Federations with two to four federal units tend to be instable.* - *Normally a combination of different criteria is applied.* - *Decisions on boundaries of federal units might be easier to reach if there are certain guarantees on the internal organization of federal units or on other parts of the constitution (e.g. inclusiveness of the federal unit's political institutions, strong protection of individual and minority rights) that can reassure minorities within prospective federal units.* - *Constitutionally established procedures and provisions on future boundary change might further help to reach a decision on federal units in the first place. For instance, Nigeria, Ethiopia and Switzerland foresee a constitutional procedure to change boundaries and to create new federal units*

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
	- If yes, by whom and how can boundary change be initiated? - Who shall have a say in the procedure, the centre, the concerned federal units, minorities within concerned federal units, some or all of them? - Shall there be specific criteria, e.g. minimum number of population, economic viability to limit boundary changes? - Shall there be special majority requirements, consultation procedures, referenda?	
3. Organization of federal units	- Shall federal units have the right to **self-organization** (right to an own constitution, right to define its legislature, executive, (judiciary)? If federal units have the right to self-organization, will the national Constitution provide an interim organization until federal units can decide on their own organization? - Or shall the internal organization of federal units be defined in the Constitution (and laws)? - Or shall the central constitution establish standards and guidelines for the federal units regarding how to organise themselves or provide different forms of organization for the federal units to choose from? - If the national Constitution establishes the internal organization, what **governmental system** shall the federal units have – parliamentary or presidential? Shall the form of government of federal units resemble the form of government at the centre? - Shall there be a president, a first/chief minister, a governor – only one of them, two or all. What powers shall they have? Shall there be requirements of inclusiveness? - How shall the **government** be organised (e.g. number and type of federal unit ministries)? How shall the federal unit administration be organised? Shall there be requirements of inclusiveness, e.g. equitable representation of all ethnic linguistic and religious groups, women?	

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
	- How shall the **legislature of the federal unit** be organised (e.g. one or two chambers, number of representatives (full time or not), electoral system, guarantees of inclusiveness, incompatibilities, mandatory standing parliamentary commissions, decision-making procedures, powers of federal unit parliament)? - Shall there be regional or local political parties? - Shall there be a **federal unit judiciary**? How shall it be organised? What are the competencies of the federal unit judiciaries, how are judges selected and appointed, how is the relationship of the federal unit judiciary to the central judiciary (separate judiciaries for central and federal unit matters (dual system) or a uniform judiciary established by national law or lower level courts set up by federal units and higher level courts by the centre)? - What **additional federal unit** bodies shall be established, e.g. Human Rights Commissions, auditors? - What national institutions shall operate within the federal units, e.g. election commission, military, police, auditor general, branches of the central government? - What will **official languages** in the federal units be? Who decides based on what criteria and procedures? What will the status of official language incorporate? - How will the **civil service** be organised? Will federal units set their own rules on working conditions, employment criteria, pay, evaluation or shall there be one civil service? - What will the status of **citizens from other federal units** be? Shall they have equal rights, e.g. for buying property, to work in the civil service? How can these rights be guaranteed? - How will human rights and the rights of **minorities** be guaranteed at the level federal units? - Shall the constitution determine the date for the **first federal unit elections**? What are preconditions that elections can take place?	

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
4. Distribution of powers	- What kind of **exclusive powers** shall the federal units/the centre have? What kind of powers shall be **concurrent** (the centre and the federal units can regulate)? - Which **regulation** prevails in the case when both the centre and the federal units regulate? - Shall there be **shared powers**, e.g. the centre defines the policy or standards, while the federal unit level administers and enacts bylaws, or is the central level in charge of major roads, the federal unit level of less important roads? - What **criteria** shall be applied for the distribution of powers? Who decides? - What powers are of **special importance** for the lower levels of government, e.g. for the protection of their identity? - Shall all federal units have the same amount of powers or shall **asymmetries** be possible? - Who shall have the **residual power** (the power to decide when the constitution is mute), the centre or the federal units? - How shall powers be listed in the constitution e.g. in schedules? - In how far shall the centre have the possibility to delegate powers to the federal units? Shall the centre have the possibility to delegate powers only to some selected federal units? In how far shall federal units have the possibility to delegate powers to the centre or to lower levels of government? - Who will implement central and federal unit legislation? Will branches of the central administration be in charge of implementing central legislation or will the federal unit administration fulfil this task.	- *Most recent federations established so called schedules. These are separate lists of powers with (1) exclusive central powers, (2) exclusive federal unit powers, (2) concurrent federal unit and central powers. Sometimes schedules are added to list powers of local governments. For instance, the Constitution of South Africa includes schedules for the central, the provincial and the municipal level. For a very detailed example see the CPA for Sudan* http://www.usip.org/library/pa/sudan/power_sharing_05262004.pdf - *The more concurrent powers there are, the more coordination is needed.* - *Most policy issues are complex. For each policy area it can be decided which functions can be fulfilled by lower levels of government and which functions are so complex, financially demanding or require coordination that they should be assumed by the centre.*

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
5. Allocation of resources	- What minimum resources do federal units need to assume their powers? - What sources of revenue shall be allocated to the different levels of government? Shall revenue bases be shared or attributed exclusively to one level only? Who will tax income of persons and companies, sales, services, land, vehicles, others) - Who shall own/control natural resources (water, forest, oil, coal, others)? - How and by whom shall rates for taxes, duties and royalties be set? - Shall there be fiscal competition between federal units and different financial burdens for citizens? - How shall revenues be distributed? Who shall be in charge of revenue distribution? Shall there be conditional and non-conditional transfers? Shall the rules/quotas for distribution be regulated in the Constitution? Are there regular review mechanisms to readjust the attribution of revenues? - How shall differences in financial capacity and service provision costs of federal units be addressed? Shall there be equalization mechanisms? How shall equalization take place? To what level? By whom? Who decides? - What shall be the budgetary powers of federal units? Shall federal units be able to borrow?	- *In order to assume their powers, federal units need adequate resources. Therefor decisions on wealth sharing have to be coordinated with decisions on the distribution of powers. Resources should be distributed to the different levels of government in relation to powers and responsibilities they have.* - *Genuine self-rule presupposes a certain amount of non-conditional funds.*
**Shared Rule Aspects**	
6. Upper House of Parliament	- How shall federal units be included in **central decision-making**? How shall their interests be protected? - How shall the **upper house of parliament** (chamber representing the federal units) be organised? - **Who** shall be represented, 'only' the federal units or also other territorial units or groups? Shall there be requirements that representatives from one federal unit fulfil certain inclusiveness criteria? Shall all federal units be represented equally or shall representation be weighted (more populous federal units having more representatives)?	- *Most federal countries have a second chamber of parliament (upper house), however there are huge differences in organization and powers. The upper house should provide for the effective participation of federal units in central decision-making, at least in respect to policy areas that concern the federal units directly.*

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
	- Shall federal units be able to decide how to select representatives? If the mode of selection shall be regulated in the constitution, shall representatives be directly or indirectly elected or appointed (by whom – federal unit government or legislature or centre), or shall a mixed system be introduced? If they are elected, what electoral system shall apply? - Shall representatives of one federal unit have one combined vote or can each representative cast a separate vote? Shall federal units be able to instruct their representatives how to vote? - What are the **powers** of the upper house in relation to the lower house? Do both chambers have equal powers? Shall the upper house have less powers (e.g. for adopting legislation), shall the upper house have more powers (e.g. in respect to the budget) or additional tasks (e.g. to weigh over the inclusiveness of institutions)? - More specifically, how shall the legislative process look like especially if/when both chambers are involved: who starts debating, what happens when the two chambers disagree, can the upper house veto or delay legislation? - Shall there be **joint sessions** of both chambers of parliament, on what occasions, for what tasks? Shall there be joint committees, e.g. to resolve disputes?	
7. Further elements	- Shall there be a correlation between federal units and national election constituencies? - Shall the equitable representation of federal units in central institutions be required for other institutions as well, e.g. the national executive, courts, the national administration, police or army? - Shall there be a specific ministry in charge of federal relations or for coordinating the implementation of federalism? - How shall the federal units be included in the process of constitutional amendment?	

Issues (reform steps / decisions to be taken)	Key-questions (for designing principles and options of federal state organization)	Comments
	Additional aspects	
8. Control and assistance	- Shall the centre have any **powers to intervene** in the federal units (e.g. for the sake of national security, human and minority rights, respect of the constitution, national law and international obligations, mismanagement by federal unit), if yes, in what cases and by what means (e.g. dissolve government, rule directly, annul decisions, send troops)? - Can federal units **demand assistance** from other federal units or the centre, e.g. in cases of emergency within the province, in case of financial problems? Who requests, who decides, what measures can be taken, who pays?	
9. Coordination and dispute resolution?	- What kind of **coordination mechanisms** shall be introduced for coordination between the federal units and the centre and among federal units? Shall there be coordination meetings of heads of government, of ministers? Shall there be special joint committees or institutions, with or without decision-making powers? - Shall there be mandatory coordination or cooperation for specific tasks? Shall there be a special legislative framework to promote coordination and cooperation? - What kind of **dispute resolution mechanisms** shall be foreseen? Shall there be special courts, regular courts, direct jurisdiction of the supreme court for specific disputes? Shall coordination bodies also have a dispute resolution role?	
10. Transition	- How to **manage** the transition? Who shall be in charge of coordinating, monitoring the transition? Shall there be an independent commission for monitoring, a specific ministry?	

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48	**La situation des femmes dans le monde arabe** (01/2010)	• « La situation des femmes dans le monde arabe » • La violence domestique à l'égard des femmes dans la société palestinienne • Les femmes dans les professions de la santé en Jordanie • « Dernier voyage à Marrakech » ou Comment moraliser le genre dans une chronique judiciaire • « Féminisme d'État Tunisien »: 50 ans plus tard, la situation des Tunisiennes • La longue marche des femmes marocaines. De Akhawât as-safâ' à la Caravane des droits • Le parcours militant d'une femme kurde de Syrie. De la cause kurde à la défense des droits des femmes • Les représentations des femmes dans le discours nationaliste palestinien autour de la commémoration du cinquantenaire de la Nakba • Représentations de la place des femmes musulmanes dans l'Islam en Suisse romande
49	**Swiss Science Diplomacy** (02/2010)	• Genèse et première croissance du réseau des conseillers scientifiques suisses (1958-1990) • Le réseau suisse des conseillers scientifiques et technologiques de 1990 à la création de swissnex • Gedanken eines Zeitzeugen zum Start des Wissenschaftsrates von 1958 • Douze années japonaises: 1986-1998 • La nouvelle diplomatie scientifique de la Suisse et le modèle swissnex: l'exemple de Boston après 10 ans • La Suisse scientifique dans le monde du 21ème siècle: maintenir le cap ! • Science Diplomacy Networks
50	**Dealing with the Past** (03/2010)	• A Conceptual Framework for Dealing with the Past • A normative conception of Transitional Justice • The right to know: a key factor in combating impunity • Rule of law and international, national justice mechanisms • Reparation programs: Patterns, Tendencies, and Challenges • The role of Security Sector Reform in Dealing with the Past • Dealing with the Past in peace mediation • Pursuing Peace in an Era of International Justice • Transitional Justice and Conflict Transformation in Conversation • Reflection on the role of the victims during transitional justice processes in Latin America • Archives against Amnesia • Business in armed conflict zones: how to avoid complicity and comply with international standards • Masculinity and Transitional Justice: An Exploratory Essay • The application of Forensic anthropology to the investigation into cases of political violence • Dealing with the past: The forensic-led approach to the missing persons issue in Kosovo • A Holistic Approach to Dealing with the Past in the Balkans • West and Central Africa : an African voice on Dealing with the Past • Dealing with the Past in DRC: the path followed? • Challenges in implementing the peace agreement in Nepal: Dealing with the Impasse • Switzerland, the Third Reich, Apartheid, Remembrance and Historical Research. Certainties, Questions, Controversies and Work on the Past
51	**Un Kosovo unitaire divisé** (01/2011)	• Définitions constitutionnelles du Kosovo • Les prérogatives de l'Etat au Kosovo dans la pratique • Approche • Environnement humain au Nord du Kosovo • Grille d'analyse, hypothèses et concepts • Géographie • Populations : descriptions et chiffres • La division au quotidien

51	**Un Kosovo unitaire divisé** (01/2011)	• Economie • Niveaux de vie • Perceptions • Institutions • Trois niveaux de blocages • Etat de droit : quel droit ? • Institutions locales • Efficacité des institutions ? • Les institutions vues par les citoyens • Organisations internationales • MINUK, OSCE, KFOR • EULEX • ICO / EUSR • Le facilitateur de l'UE pour le Nord du Kosovo • Stratégies et discours • Absence de dialogue – politique du fait accompli • Discours inachevés • Stratégie de Belgrade • Stratégie de Pristina • Du partage à la partition ? • Implications d'une partition pour le Kosovo • Dialogue et coopération régionale
52	**Religion in Conflict Transformation** (02/2011)	• Religion in Conflict Transformation in a Nutshell • When Religions and Worldviews Meet: Swiss Experiences and Contributions • Introduction to the Conference "When Religions and Worldviews Meet" • Competing Political Science Perspectives on the Role of Religion in Conflict • Transforming Conflicts with Religious Dimensions: Using the Cultural-Linguistic Model • Culture-sensitive Process Design: Overcoming Ethical and Methodological Dilemmas • Transforming Religious-Political Conflicts: Decoding-Recoding Positions and Goals • Creating Shifts: Using Arts in Conflicts with Religious Dimensions • Diapraxis: Towards Joint Ownership and Co-citizenship interviewed by Damiano A Sguaitamatti • Diapraxis in Different Contexts: a Brief Discussion with Rasmussen • Bridging Worlds: Culturally Balanced Co-Mediation • Connecting Evangelical Christians and Conservative Muslims • Tajikistan: Diapraxis between the Secular Government and Political Islamic Actors • Swiss Egyptian NGO Dialogue as an Example of "Dialogue through Practice" (Diapraxis) • Communities Defeat Terrorism–Counter-Terrorism Defeats Communities, The Experience of an Islamic Center in London after 9/11
53	**« Révoltes arabes : regards croisés sur le Moyen-Orient »** (01/2012)	• Révoltes arabes : Regards croisés sur le Moyen-Orient • La position géopolitique de l'Asie antérieure • Les révoltes arabes : réflexions et perspectives aprčs un an de mobilisation • Printemps arabe et droit public • Le cas syrien • The Arab Gulf Monarchies: A Region spared by the 'Arab Spring'? • La France dans le pičge du printemps arabe
54	**Tenth Anniversary of the International Criminal Court: the Challenges of Complementarity** (02/2012)	• Ten Years after the Birth of the International Criminal Court, the Challenges of Complementarity • We built the greatest Monument. Our Monument is not made of Stone. It is the Verdict itself. • Looking Toward a Universal International Criminal Court: a Comprehensive Approach • What does complementarity commit us to? • Justice and Peace, the Role of the ICC • Towards a Stronger Commitment by the UN Security Council to the International Criminal Court • Where do we stand on universal jurisdiction? Proposed points for further reflexion and debate • Challenges in prosecuting under universal jurisdiction • Commissions of Inquiry : Lessons Learned and Good Practices • Towards the Creation of a New Political Community • The Fate of the Truth and Reconciliation Commission in the Federal Republic of Yugoslavia-Serbia

		• When Politics Hinder Truth: Reflecting on the Legacy of the Commission for Truth and Friendship • On Writing History and Forging Identity • Colombia and the Victims of Violence and Armed Conflict • Historical Memory as a Means of Community Resistance • How We Perceive the Past : Bosnia and Herzegovina, 17 Years On • Regional Approach to Healing the Wounds of the Past • Challenges in Dealing with the Past in Kosovo : From Territorial Administration to Supervised Independence and Beyond • Setting up Mechanisms for Transitional Justice in Burundi : Between Hope and Fear • « My Papa Is There » • Transitional Justice Mechanisms to Address Impunity in Nepal • Nepal: Better no Truth Commission than a Truth Commission Manipulated • Spain and the Basque Conflict : From one Model of Transition to Another • Moving to a new Social Truth • Peace and Coexistence • EUSKAL MEMORIA : Recovering the Memories of a Rejected People • France and the Resolution of the Basque Conflict • Democracy and the Past
55	**L'eau – ça ne coule pas toujours de source** **Complexité des enjeux et diversité des situations** **(01/2013)**	• L'Eau douce est au centre du développement de l'humanité, la Suisse est concernée • Empreinte hydrique: la Suisse et la crise globale de l'eau • S'engager sur le front de la crise globale de l'eau au service des plus pauvres: un défi que doivent relever les entrepreneurs des Greentec suisses • Le partenariat innovant de la Haute Ecole de l'Arc Jurassien dans l'acquisition des données pour l'eau et l'agriculture : les nouvelles technologies participatives au service du développement • Se laver les mains avec du savon, une des clés de la santé publique mondiale • De l'or bleu en Asie Centrale • Ukraine: quand la décentralisation passe par l'eau • Noël à Mindanao • La contribution de la coopération économique du SECO au défi de la Gestion des réseaux d'eau urbains • Diplomatie de l'eau: l'exemple du Moyen-Orient • Le centime de l'eau: la solidarité de toute une ville !
	La diplomatie suisse en action pour protéger des intérêts étrangers (01/2014)	• Swiss Diplomacy in Action: Protective Power Mandates • Aperçu historique sur la représentation des intérêts étrangers par la Suisse et sur les activités de Walter Stucki en France • Du mandat suisse de puissance protectrice des Etats-Unis en Iran • Le mandat suisse de puissance protectrice Russie-Géorgie : négociations avec la Russie et établissement de la section des intérêts géorgiens à Moscou • Questions et réponses lors du débat du 15 décembre 2011 • Documents et photographies
57	**Switzerland and Internet governance: Issues, actors, and challenges** (02/2014)	• The evolution of Internet governance • WHY is Internet governance important for Switzerland? • What are the Internet governance issues? • What are the seven Internet governance baskets? • WHO are the main players? • HOW is Internet governance debated? • WHERE is Internet governance currently debated? • Foreseeable scenarios • Recommendations
58	**Bei Not und Krise im Ausland** Konsularischer Schutz und Krisenmanagement der Schweiz im 21. Jahrhundert **En cas de détresse et de crise à l'étranger** La protection consulaire et la gestiondes crises de la Suisse au 21ème siècle (03/2014)	• „Plane Gut. Reise gut" Der konsularische Schutz der Schweiz • « Départ réfléchi. Voyage réussi » La protection consulaire de la Suisse • Das Krisenmanagement-Zentrum des EDA – Heute und in Zukunft • Le Centre de gestion des crises du DFAE – Aujourd'hui et demain • « Responsable moi ? » La perception de la notion de responsabilité individuelle chez le citoyen suisse se rendant à l'étranger • « Un indien averti en vaut deux » Le point sur l'aventure psychologique des voyageurs

58	**Bei Not und Krise im Ausland**
	
	Konsularischer Schutz und Krisen-management der Schweiz im 21. Jahrhundert
	
	En cas de détresse et de crise à l'étranger
	
	La protection consulaire et la gestion des crises de la Suisse au 21ème siècle
	
	(03/2014)
		• „Ich denke immer wieder daran!»
		  Langfristige Verarbeitung von schwerwiegenden Ereignissen
		• Abseits der Normalrouten Reisealltag eines Afrikakorrespondenten
		• Konfrontiert mit dem Ungewissen
		  Zwischen institutioneller Pflicht und Eigenverantwortung am Beispiel einer Mitarbeiterin von Mission 21 in der Republik Südsudan
		• Das kollektive Gedenken zur Bewältigung von Katastrophen
		• Luxor – 1997
		• Drei Tage, die eine Ewigkeit waren
		• Halifax – 1998
		• SR 111
		• Thailand – 2004
		• Tsunami im indischen Ozean / Tsunami dans l'océan indien
		• Rückblick vom damaligen Missionschef der Schweizer Botschaft in Bangkok
		• Rückschau eines Detachierten der Schweizer Botschaft zur Situation im Unglücksgebiet in Thailand
		• Détachement pour la coordination des interventions dans la zone de Phuket
		• Learing by doing an der Tsunami-Hotline
		• Liban – 2006
		• « Evacuez ! »
		• Guerre Hezbollah / Israël
		• Haiti - 2010
		• Im Kriseneinsatz nach dem Erdbeben in Haiti
		• À la recherche de concitoyens
		• Evakuation von Kindern
		• Fukushima - 2011
		• Erdbeben, Tsunami, nukleare Verstrahlung
		• Organisation der Verwaltung / Organisation administrative
		• Das Krisenmanagement des EDA im Zeitraum 2002 bis 2006
		• Das Krisenmanagement des EDA, die Entwicklung bis 2010
		• Création du Centre de gestion des crises
		  Multiplication des crises et des défis
		• Die Konsularische Direktion
		  Konsequente Weiterführung eines Erfolgsmodells
		• Umsetzungsinstrumente / Instruments de mise en oeuvre
		• Im Büro fühle ich mich am sichersten
		  Reisehinweise des EDA
		• Es ist wahrscheinlich, dass das Unwahrscheinliche geschieht
		  Die Entwicklung der Hotline und Helpline EDA
		• Missions KEP : un témoignage Synergies d'actions
		  Collaboration entre l'Aide humanitaire et le Centre de gestion des crise (KMZ)
		• Zusammenarbeit in Krisen, eine Notwendigkeit
		  Zusammenarbeit des Eidgenössischen Departements für auswärtige Angelegenheiten mit dem Bundesamt für Bevölkerungsschutz
		• Protection consulaire : le dynamisme indispensable d'une institution millénaire

59	**Réflexions autour du pétrole au Moyen-Orient** (01/2015)	• A Middle Eastern "Rubik's Cube": Solution Problems Reflections on the First Stage of the Arab Spring • What the Drop in oil prices holds for the Middle East, Russia and beyond? • Pétrole - Moyen-Orient, Irak et Kurdistan irakien : état des lieux et évolution • Petrole et geopolitique au Kurdistan irakien • Vers une indépendance kurde en Irak ? Le Kurdistan et l'évolution de ses relations avec la Turquie • Rente, fédéralisme et transition en Irak : démocratie ou nouvel ordre autoritaire ? • Le Moyen-Orient au cœur des enjeux énergétiques de la Chine • Avec le négoce des matières premières, la Suisse joue sa réputation
60	**The Caucasus Conflicts: Frozen and Shelved ?** (02/2015)	• Abkhazia: Regulations for Trade with Disputed Statehood • Conflict and Peace in South Ossetia – from a Local Perspective • History Dialogue between Georgians and Abkhaz: How Can Working with the Past Pave New Ways? • Bridging Gaps in Civilian Peacebuilding in the Nagorny Karabakh Context • Armenia: An Interior View • Stability without Peace in Chechnya • The Role of the Chairmanship in the OSCE Engagement in the South Caucasus • The Work of the OSCE High-Level Planning Group

		• Mediating Ambiguity – Contrasting the Mediation Perspectives of the Belgrade-Pristina Dialogue and the Geneva International Discussions • Neither War Nor Peace in Georgia: Geneva Discussions Seen from a UN Angle • The EUMM's Work in Georgia
61	**Schweizer Partnerschaft mit der NATO** 20 Jahre Schweizer Teilnahme an der Partnerschaft für den Frieden (01/2016)	• 20 Jahre PfP: Geschichte und Rückblick der Schweizer Erfahrungen • Adolf Ogi: „Die Partnerschaft für den Frieden ist vielleicht der beste Deal, den wir je erhalten haben" • 20 Jahre Schweizer Beteiligung an der Partnerschaft für den Frieden mit der NATO • Behutsame Schritte in die Partnerschaft für den Frieden - Überlegungen eines aussenstehenden Beobachters • Die Schweiz und die NATO vor der Partnerschaft für den Frieden,1949-1995 • Aktueller Stand der Beziehungen • Partnerschaft für den Frieden: sicherheitspolitische Einbettung • Aussenpolitische Bedeutung der Partnerschaft für den Frieden • Le rôle de la Mission suisse auprès de l'OTAN • Der Beitrag der Genfer Zentren zur Partnerschaft für den Frieden • Praktische Aspekte der Schweizer Teilnahme an der PfP und die Rolle der PfP angesichts aktueller Herausforderungen • Entwicklung der Partnerschaft und ihre Bedeutung für die Schweizer Armee • Le Partenariat pour la Paix: tout bénéfice pour les Forces aériennes • Praktischer Nutzen der Partnerschaft für die Schweizer Armee • Utilité de l'interopérabilité • Nutzen der Partnerschaft für die einsatzorientierte Ausbildung in der Friedensförderung • armasuisse und die Partnerschaft für den Frieden • Einsatz der SOG im Rahmen von «Partnership for Peace» • Les défis du PPP • Die PfP aus Sicht anderer europäischer Staaten • 20 Years of Austrian Partnership with NATO – Record and Outlook • Finnish view of NATO Partnership • Ausblick: Wie entwickelt sich die PfP in der Zukunft? • Rethinking NATO's Partnerships for the new security environment • PfP, Multipolarity and the Challenges in the Middle East and North Africa • Die Schweiz und der Wandel der NATO-Partnerschaftspolitik, 1996-2016
62	**Der Bund und die Ausland-schweizerinnen und -schweizer** La Confédération et les Suissesses et Suisses de l'étranger (02/2016)	• Die Tätigkeit des Bundes für eine starke Verbindung der Auslandschweizerinnen und Auslandschweizer zur Heimat • Invitation à la decouverte des Suissesses et Suisses de l'étranger • Mobility to and from Switzerland • La construction de la Cinquième Suisse au cœur de l'internationalisation de l'économie • Aktuelle Entwicklungstendenzen des Profils der Auswanderinnen und Auswanderer aus der Schweiz • Die Aus- und Rückwanderungsberatung des EDA • Stagiaires: Auslandschweizerinnen und Auslandschweizer auf Zeit • Gelebte Mobilität in der beruflichen Grundbildung im Technologiekonzern Bühler • Schweizer (Berufs-)Bildung im Kontext internationaler Mobilität • Neue Wege für das Studium im Ausland • Que fait concrètement le SECO pour aider les Suisses de l'étranger ? • Les 50 ans de l'article constitutionnel sur les Suisses de l'étranger • Immatriculation hier, annonce aujourd'hui – un exemple de lien entre le citoyen à l'étranger et les autorités de la patrie • eVERA – à l'heure des services consulaires en ligne • La Cinquième Suisse, maillon important du réseau de contacts de notre diplomatie • Lyon - Depuis 2010 • Sydney - Zweimal Nationalfeiertag 2015 • Kairo - „Revolution" 2011 • Los Angeles - 2010 bis 2013 • Bangkok - 2009 bis 2015 • New York - de 2010 à 2014 • Mailand-Abidjan-Wellington - 2005 bis 2016 • Seoul - 2012 bis 2016 • Hong Kong - 2014 bis 2015 • Die Schweizer Revue zwischen Leistungsauftrag und Sparvorgaben • Swissinfo.ch – der Link zur Heimat • Der Bund und die Ausübung der politischen Rechte aus dem Ausland • Die Sozialhilfe für Auslandschweizer und Auslandschweizerinnen

| 62 | **Der Bund und die Ausland-schweizerinnen und -schweizer**

La Confédération et les Suissesses et Suisses de l'étranger

(02/2016) | • Der Zugang zur Sozialvorsorge des Bundes für Auslandschweizerinnen und Ausland-schweizer
• Haben Schweizer Banken etwas gegen Auslandschweizerinnen und Auslandschweizer als Kunden?
• Der Schweizerverein Helvetia: Ein Stück Heimat in Hamburg
• Die Plattform in einer Region ausserhalb der Metropolen: Der Schweizerverein Jütland und Fünen
• Das Swiss Institute, New York
• Pro Ticino, l'associazione che riunisce i ticiniesi fuori cantone … in rete
• Vous avez dit OSE?
• Die ASO und die Jugend
• Schweizerschulen im Ausland
• Erinnerungen an die Schweizer Schule Rom
• Portrait d'une école suisse à l'étranger : le Colegio Helvetia de Bogota
• Mit zwei Kulturen aufzuwachsen bringt viele Erfahrungen und erweitert den Horizont
• Die Schweizerschule Bangkok und ihr Patronatskanton Luzern
• Von der Schweiz nach Mexiko und wieder zurück |
| 63 | **Die Auslandschweizergemeinschaft: Profil – Netze – Partnerschaften**

La communauté des Suisses de l'étranger : profil – réseaux – partenariats

(03/2016) | • Internationale Wanderungen von Schweizer Staatsangehörigen
• Schweizerinnen und Schweizer in der Volksrepublik China: jung, mobil und auf der Suche nach Herausforderung
• Les habitants suisses des régions françaises limitrophes de la Suisse
• Südbaden und die Schweizer – einkaufen ja, wohnen nein?
• Zuwanderung von Schweizerinnen und Schweizern: eine deutsche
• Perspektive
• Auslandschweizer sind mehrheitlich Doppelbürger – Grund und mögliche Folgen
• Chancen und Schwierigkeiten der Doppelbürgerschaft in Frankreich
• Wenn Statistiken an ihre Grenzen stossen – das Beispiel der Schweizerinnen und Schweizer in Israel
• Integration und Assimilation in fremden Ländern
• Kästen und Interview: Beispiel Thailand
• «Migration in den Herkunftsstaat der Vorfahren»: Das Beispiel von Personen schweizeri-scher Abstammung aus Argentinien
• La Cinquième Suisse, maillon important du réseau de contacts de notre diplomatie
• Die Partnerschaften des Bundes |