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INPROL Consolidated Response (10–003)



Drafted by Jason Gluck
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POST-CONFLICT CONSTITUTION MAKING: HOW TO DEVOLVE POWER FROM CENTRAL TO LOCAL GOVERNMENT

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Note: All opinions stated in this consolidated response have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.

Background:

Federal structures are becoming more commonplace in both the developed and developing world. For states considering drafting – or re-drafting – their constitution, issues involving federalism and decentralization may arise, including how to transition powers to lower orders of government that may have scant experience in governing, if they even previously existed at all. This Consolidated Response addresses the aspect of devolution as it relates to the Nepal Constitutional debate, but provides guidance and principles that can be applied to other states wishing to pursue a process of federalism and decentralization.

Query:

Nepal is in the process of drafting a new constitution with the hopes of creating a federal structure and decentralized powers. In connection with the federal structure, issues will include when new governments need to be formed, when and how they will take on their responsibilities and what body or bodies will have oversight of this process of federalization.

It would assist us greatly to have the benefit of any recent experiences and good practices in connection with the implementation of a new federal structure in post-conflict settings. Experiences based on countries that have moved from a unitary structure to a federal structure, as well as experiences of federalization as part of post-conflict peacebuilding, would be particularly instructive.

Response Summary:

This consolidated response explores how constitutions can articulate the process of devolving power from the central government to lower orders of government in a federal system. Part I provides an introduction to federalism. Part II discusses general considerations of devolution. Part III discusses constitutional treatment of devolution as a right. Part IV discusses devolution as a negotiated process. Finally, Part V briefly touches upon the role of secondary legislation in devolution.

A threshold issue when integrating a federal structure into a new constitution is whether transfer of responsibility from national to local government will be (a) a right (or obligation) of the provinces; or (b) a negotiated or supervised process between the provinces and national government. In either case drafters will need to decide how much detail to put in the Constitution and how much to leave to secondary legislation (devolution is often undertaken entirely through secondary legislation).

I. Introduction to Federalism

Federalism refers to a government structure that shares powers between different tiers of government, with a central government common among most federal systems. Each tier has a written constitution, giving them autonomous existence. Federal systems will

often vary the way they share power between the central government and sub-government entities. Furthermore, the sub-governments do not always share equal power between each other.¹ These issues will appear throughout the discussion of devolution in the following sections.

II. General Considerations for Devolution

Devolution refers to the process whereby a central government transfers its powers to a lower order of government (most often regional/provincial or local/municipal).

Regardless of the exact process Nepal, or other post-conflict and fragile states, adopts, certain considerations will be critical to increase the likelihood of successful devolution. These considerations should occur either in the constitution-drafting or legislative drafting processes.

Considerations for Devolution:

1. Clearly delineate powers for each level of government (with the possibility of additional delegation, if desired).
2. Set forth whether devolution is by right or negotiation and whether it is uniform or asymmetrical.
3. Include the transfer of the fiscal or budgetary resources, facilities, and equipment of the discontinued federal entities. Resources may be made available through the right of provinces to raise their own revenue, through fiscal transfers, sub-national borrowing, or some combination of the above.
4. Provide for effective monitoring and oversight of the devolution process. (This does not have to be by the national government but could instead be conducted by an intergovernmental commission.)
5. Provide a mechanism for dispute resolution to address issues that may arise during the devolution process.
6. Allow for a transition period in order for the provinces to build up the necessary institutional, political, financial, and administrative capacity. Where possible this period should include training of provincial officials/staff by their national counterparts.
7. Where possible, ensure that the technical expertise and institutional memory of the discontinued federal entities are preserved, communicated, or transferred to the provinces.
8. Take into account current and ongoing projects related to the competencies to be

¹ [Forum of Federations, "An Overview of Federalism," *Federalism: An Introduction* \(2005\): 5.](#)

transferred to the provinces.

9. Take into account outstanding obligations and commitments of the discontinued federal entities.

III. Devolution as a Right Set out in the Constitution

A. Overview of Devolution as a Right

Often times, the process of devolution is set out in the Constitution. If so, lower orders of government will have an absolute right to certain powers and responsibilities. The Constitution may provide the process sub-national governments must follow to assert their rights, may leave it to secondary legislation, or some combination thereof. This section uses the Iraqi example to illustrate devolution as a right in practice, and then notes some lessons learned from that experience.

B. Iraq: No Obstruction to the Right

Iraq offers the most extreme example of a Constitution that provides an absolute right of provinces to assume certain authority and competencies from the national government. Most of Iraq is made up of provinces that, though possessing government structures, have very little authority over spending or service delivery – both are conducted primarily by the national ministries operating in the provinces. Every province, however, has the constitutional right to become a region (like Kurdistan), at which point the newly formed region has a constitutional right to a proportional share of national revenues (based on the population of the province) and assumes responsibility for almost every basic service, including the courts. It's a massive transformation. And because the most powerful political actors during the constitutional negotiations were determined to keep this right free from potential political obstruction, the only constitutional requirements for a province to become a region is for the province to: (1) pass a referendum on regionalization; and (2) adopt a constitution that "defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities." (See [Iraq Constitution \(Comparative Constitutions 2008\)](#): Articles 119 & 120). That's it. The next day, constitutionally, the new region has full executive, legislative, and judicial authority.

C. Lesson Applied: Creating a Transition Mechanism

If Nepalese constitutional drafters decide to provide Nepal's provinces with the right to assume certain functions without national approval (free from national obstruction), it may still be prudent to design a scheme that transitions authorities and responsibilities from the national ministries to provincial authorities while protecting local government and the citizenry from a total breakdown in service delivery. Some transitional mechanisms that might strike the appropriate balance include:

1. Phasing authorities and responsibilities over a fixed time frame, but without the ability of the national government to upset the timing. So, for example, in the first year local government would create the necessary institutions and mechanisms (staff, assets, and resources) to undertake the various functions of government. In the second year, a predetermined list of powers/responsibilities would be transferred. In the third year more powers/responsibilities would be transferred, etc.
2. Providing for an interim period for local government to build up the staff, assets, and resources necessary for it to assume responsibility over service delivery, with local government dictating the pace of transfer subject only to the existence of the structures required and the elapsing and completion of the interim period.
3. The Constitution (or secondary legislation) could mandate basic minimum requirements of local government, such as democratic functioning, executive accountability, independence of the judiciary, and transparency in government expenditure in accordance with a budget adopted by the local government, before power is transferred. The idea being the demonstration of objective benchmarks would trigger the transfer. (This last mechanism is not mutually exclusive with the first two. Further, all three procedures might include a mechanism (courts, most likely) for dispute resolution.)
4. A provision allowing local and national government to delegate any responsibility back and forth by mutual agreement. This would provide a safety net for the national government to execute any competencies provincial government was not capable of handing until the province developed the necessary capacity.

IV. Devolution as a Negotiated or Supervised Process between the National Government and Provinces

A. Overview of Devolution as a Negotiated Process

Iraq is an extreme example of local government's unfettered right to assume certain powers. Much more common is for the process to involve a negotiation between the provincial and national governments and/or a process supervised or monitored by the national government. The trade off is that while there is likely to be a longer and more dependable transition (though this by no means guarantees a smooth transition) the process can (at least from the perspective of local government) be delayed, obstructed, or even vetoed by national interests. This has been the experience of some Spanish provinces seeking greater autonomy.

B. Spain: Negotiated Devolution

The Spanish Constitution creates a three-tiered federal system. The general rules and

framework for devolution is set forth in the Spanish Constitution, though secondary legislation plays a critical role as well.

Key Constitutional Provisions:

1. Negotiated devolution through a Statute of Autonomy for provinces (Section 146).
2. Application by provinces for the status of Autonomous Community (AC) (Sections 143-149).
 - a. Procedures
 - b. Information contained in Statute of Authority
 - c. Powers transferred once National Parliament approves
3. Additional powers that may be devolved to ACs through secondary legislation (Section 150).

Other Key Constitutional Provisions:

1. A process of expedited transition of power. (Sections 151 & 152)
2. National oversight over the ACs. (Section 153)
3. The right of the national government to direct the AC in limited circumstances. (Section 155)
4. The ACs right to and means of raising revenue. (Sections 156 & 157)
5. Fiscal transfers between the national and AC governments. (Section 158)

Source: [Spain Constitution \(1978\), as amended \(1992\), translated by Comparative Constitutions Project \(2008\)](#).

Unlike the Iraqi scheme, the Spanish Constitution provides no guarantee of devolution. The pace of the decentralization has depended not only on a region's capacity but its political influence in the central government.

V. Devolution through Secondary Legislation

Regardless of the constitutional framework Nepal adopts, the transition of power from national to provincial authority will require legislation. Indeed, it would be a mistake to try and capture the entire process constitutionally as it would require fleshing out the entire process at a time when Nepal's political and governmental future is uncertain, and would make the process rigid and uneasy to amend. In Spain, despite the framework laid out in the Constitution, decentralization is largely determined through

separate laws and agreements negotiated between the ACs (sometimes jointly and sometimes separately) and the national government.

In addition, many countries have devolved powers predominantly through legislation. Argentina and Indonesia are two such examples.² Though these countries decentralized legislatively, Nepal might borrow from these experiences and adopt their framework into its Constitution.

VI. Conclusion

As illustrated through this Consolidated Response, the process of devolving powers through different tiers of the federal structure is complex, with decisions in the constitution-drafting process significantly impacting on the federal structure. The drafting process should look at both the different models of federal structures, as well as the models of devolution.

Compilation of Resources:

[Forum of Federations, "An Overview of Federalism," *Federalism: An Introduction* \(2005\): 5](#)

[Argentina Constitution \(1994\)](#)

[Indonesia Constitution \(2002\)](#)

[Iraq Constitution \(Comparative Constitutions 2008\)](#)

[Spain Constitution \(1978\), as amended \(1992\), translated by Comparative Constitutions Project \(2008\)](#)

² [Argentina Constitution \(1994\); Indonesia Constitution \(2002\)](#).