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1. The Issue

Increasingly countries that are going through democratic transitions find they must deal with the issue of a more devolved political arrangement than existed under previously centralized and often autocratic regimes. If a country opts to constitutionalize its devolved arrangements, it may or may not opt to call the new system “federal”. Political scientists normally consider any system that constitutionally protects a significant measure of devolution to territorially defined political units across the whole country “federal”, but in some countries the term has negative symbolic connotations so it is avoided.

The classic, long-established federal countries such as the United States (1787), Switzerland (1848), Canada (1867) and Australia (1900) were all composed of various units “coming together” to form a new federal country. The new states, provinces or cantons (what we shall call “constituent units” or “CUs”) had a previous existence (in Canada’s case, Quebec and Ontario had existed as separate political units up to 1840 and were reinstated at the time of federation) and so there was no issue as to what the constituent units of the federation would be. In the United States and Canada some additional states or provinces were added subsequently as they brought new territory into the country, and yet others were created out of territories that had been thinly populated and subject to federal rule initially.

These histories where determining the territorial structure was non-controversial stand in marked contrast to several newer federations where the issue has been politically significant and even contentious. In contrast to experience in the old federations, these countries are often not creating a new country out of previously separate units, but are engaged in a constitutional transition to restructure an existing one.

While there may be agreement on the general idea of devolution or federalism, there may be no consensus on the number, character or boundaries of the new constituent units. In extreme cases, failure to agree on this issue may block agreement on a new constitution or lead to a new constitution being approved with the definition of the constituent units unresolved—which means that the implementation of devolved governance itself must be delayed.

This manual sets out elements of analysis and questions that are intended to aid practitioners and advisers in addressing how to define or delimit constituent units when it is an issue that is not resolved. It is based on a much longer working paper by the same author, *Creation of Constituent Units in Federal Systems*, which is available on-line at constitutionaltransitions.org/publications.

2. The Criteria for Defining Constituent Units: Why Federal?

A central question for any country thinking of moving from a unitary to a federal or devolved regime is “why?”—why devolve, why federalize? Is it to resolve long-standing tensions between regions or groups within the population? Even to achieve internal peace? To make government more efficient? To bring government closer to the people? To promote economic development? All of these rationales have shaped at least some federations in the past. The world’s federal and politically devolved countries include those with vast territories and huge populations as well as quite small countries made up of very distinct sub-populations. Each federation or politically devolved country has had its own combination of reasons for adopting federalism or devolution as well as the institutional forms they adopt.

The various criteria that are considered in countries moving from unitary to federal¹ or devolved regimes can include:

1. Economic factors such as efficiency and effectiveness of government. This can include the potential capacity of new CUs to assume their responsibilities, the size and development level of their population as well as their economic base to raise revenues. However, in some cases, the economic base is not considered too important in defining constituent units in that regional governments with a weak economic base may be funded by shared taxes or transfers from the central government.
2. Socio-cultural factors such as nationality, ethnicity, language, religion, tribe, and clan. In some cases, there are territories that have populations that are overwhelmingly distinct from those in other parts of the country. But often, there are also territories that have mixed populations. And there may be some politically significant minorities that are scattered widely and form the majority in no particular territory.
3. Geographic factors, such as natural boundaries like rivers and mountains. These often form "natural boundaries". However, there can be a case for having a whole river basin within a CU because it may be at the heart of an integrated territory.
4. Political balance. Federations with only 2, 3 or 4 CUs can have very difficult political dynamics in that conflicts tend to consistently run along the same divisions amongst CUs, whereas in federations with many CUs the pattern of conflicts is more fluid, with different CU alliances depending on the subject. On the other hand, countries can be concerned about having too many CUs for reasons of cost as well as the need to assure that each CU has the capacity to assume its functions. So it is a question of

balance and there may be an attempt to define CUs to fall within a range of size (no one CU so large that it dominates; none too small). There may even be an effort to balance the number of CUs in different parts of the country or made up of different population groups because this can affect the politics of the federation, e.g. through CU representation in the second chamber of the legislature.

5. Public opinion. Sensitivity to public opinion will obviously vary with the nature of the political regime: sometimes there is a dominant party that shows limited sensitivity to opposition opinions, while in other cases there may be a strong desire to design a system that has broad public support. Public opinion may be assessed through elections to a constituent assembly, through public consultations, or through other mechanisms involving local representatives or even referendums.
6. Historic boundaries. It is striking how often even a new political map for a devolved regime draws in very important ways on some previous political, administrative or historic map. People often identify with past units, and previous boundaries can provide a useful reference point and obviate the need for a detailed consideration of specific factors, such as the territorial distribution of populations with particular characteristics, that would apply to drawing new boundaries (which can be extremely contentious). Of course, there can be a debate over which previous map should be used (e.g. in Kenya they reverted to the 1992 map of districts, while in South Africa they used a map of economic development regions) and the extent to which it should be "fixed". In some cases, such as Iraq, Somalia, Spain, Yemen, the new federal map is to be based on an earlier map of districts or provinces, either separately or in combination.

¹ This paper uses the term "federal" broadly for all politically devolved regimes, whether they call themselves federal or even have constitutionalized their devolved arrangements. The underlying issues are the same.

2.1 ETHNIC VERSUS TERRITORIAL FEDERALISM

While in practice all new political maps have been based on a combination of some of these criteria, there

can be heated debates around the basic philosophy of CU creation, which in turn reflect the underlying philosophy of the form of federalism to be adopted. These debates can turn around the choice between "ethnic" or "territorial" federalism. It was the stated objective of Ethiopia to adopt "ethnic federalism" in its constitution of 1994. There are strong advocates of ethnic federalism in Nepal's current debate on federalism. The fundamental idea of ethnic federalism is that each distinct population—what Ethiopia calls nations and nationalities—should have the right to its own political unit within the federal structure. While there is no doubt that many federations have a strongly ethnic or linguistic character in their structure, a pure form of ethnic federalism gives rise to serious practical issues as well as questions of principle.

1. Practically, it is difficult to implement ethnic federalism in any fully satisfactory way because it is very rare to have different ethnic groups distributed in discrete and homogenous territorial territories. Sometimes, as in Nepal, the number and complexity of different groups means that many (or even most) territories do not have a majority group. Even where there are large territories whose population is heavily of one nationality, ethnicity, language, religion, tribe, or clan, there are almost always significant minorities in some territories. So trying to draw boundaries strictly on the basis of some identity marker of different populations can be very difficult and contentious—even impossible on occasion. It can lead to a demand for many small CUs, which would be expensive and ineffective in terms of government delivery.
2. Philosophically, ethnic federalism can pose major questions in terms of the nature of citizenship and minority rights. If CUs are deemed to "belong" to a particular group defined in terms of ethnicity, language or whatever, what does this mean for those who live in that CU who are from a different group? Will they have the same rights as their fellow citizens? Nigeria distinguishes between "indigenes", who are deemed to come from the population that historically belongs in a particular state, and "settlers", who come from populations that historically were located in other parts of the country. While settlers may have been in a state

for generations, they are not eligible for certain employment in the state government or for certain government benefits, such as aid for education.

Thus for both practical and philosophical reasons, very few federations have opted for a pure form of ethnic federalism. Even in Ethiopia, the number of states was limited for economic reasons and the rights of minorities are recognized within most states. In India, which has never advocated ethnic federalism, the major state reorganization in the 1950s was based largely on linguistic criteria but it was also explicit that other criteria were considered. Of course, many federations have CUs in which one population group forms the clear majority. This can be positive and help stabilize the country's politics. But even where this is the case, there can be explicit provisions to protect minority rights and extend relevant services to minorities. Minority language rights can be particularly important in this regard. While no government can operate in all aspects in many languages, minorities might be offered the right to use their language in the CU legislature and to receive certain services and some aspects of education in their language (as a language of instruction or a subject). In certain districts, local government might operate in a minority language and have government services provided in that language. Symbols can also be important, whether in the name of a CU (after debating naming provinces after the largest population group in the province, Nepal seems to have decided to let provincial legislature choose the names) or in the status of a minority language ("official" or some other recognition) or in the design of the CU flag (its inclusiveness or otherwise). These are examples of the kinds of accommodation that can characterize "territorial" federalism, where each CU may try, within the limits of what is feasible, to accommodate both certain regionally concentrated populations who wish to have their own CU and the minorities within that CU. Such accommodations can lower the stakes in drawing a new political map thus making the process of agreeing on a map more likely to conclude and achieve legitimacy.

Most unitary countries transitioning to a federal or politically devolved regime choose a mix of criteria for drawing their new political map. But they have adopted very different timing and processes for doing so.

3. The Timing for Drawing a New Political Map

It would seem obvious for a country transitioning to a federal or devolved regime to settle the number and boundaries of all of its CUs at the point of adopting its new constitution. However, this has not always proved possible.

3.1 CU DEFINITION COMPLETE OR VIRTUALLY COMPLETE WHEN CONSTITUTION COMES INTO FORCE

1. Belgium, Kenya, South Africa, and Spain were able to conclude the definition of their CUs when they adopted their constitutions.
2. Germany adopted its constitution in 1948 without having resolved the status of three provinces that were candidates for a merger; the constitution provided for a consultative referendum in those provinces following which they were merged. It modified its constitution after the merger with East Germany, but an outstanding issue was whether two provinces in the former East Germany should become one; a subsequent referendum voted against. The boundary between the Republic of Srpska and the Federation of Bosnia-Herzegovina, which are the two federal entities in Bosnia-Herzegovina, was unresolved in the district of Brcko when the constitution was approved in 1995. Eventually international arbitration resolved the issue in 2012 by making Brcko a democratic unit of self-governance, though without the full status of a federal entity.

3.2 INTERIM CU STRUCTURE WHEN CONSTITUTION COMES INTO FORCE

1. India adopted its constitution in 1949 on the basis of a state structure that was widely viewed as temporary, so the federation was able to operate immediately. However, to facilitate state restructuring, the constitution gave Parliament the authority to define new states by simple majority. A major redrawing was done in

the mid-1950s and since then several other states have been created.

2. Nigeria's constitution of 1960 provided for a federal structure of three states that were inherited from colonial times. However, this proved dysfunctional. When civilian government broke down, the military leaders did a series of reorganizations by decree that eventually produced 36 states. Despite the undemocratic nature of the process, this restructuring has been broadly accepted.

3.3. PARTIAL CU DEFINITION WHICH PREVENTS FULL FEDERALIZATION WHEN CONSTITUTION COMES INTO FORCE

1. Iraq adopted a federal constitution in 2005, when only Kurdistan had the status of a region, the constituent unit of the new federation. The constitution provided a procedure for governorates in other parts of the country to become regions, singly or in combination, but this has not happened yet, in part because of resistance from the federal government. Somalia's interim constitution of 2013 provides for member states to be formed out of combinations of past regions, but the absence of regional governments in most of the country has delayed this happening.

In all of these cases, except Iraq and Somalia, the country was able to operate in a federal manner throughout the country at the time its constitution was approved. The adjustments to the CU structure were made within a functioning federal system (though in Nigeria civilian government was suspended for significant periods). The lesson here is that it is desirable to conclude the CU map at the time the constitution is approved, but if that is not possible then a federation can operate on an interim map of CUs, which might be subject to minor adjustments (as in Germany and Bosnia-Herzegovina) or major redrawing (as in India and Nigeria) in due course. The Iraqi model, discussed further below, provides a possible way to stage the implementation of federalism, but it has not been implemented as was intended.

The cases above were all of countries moving to become federal. There are also cases of long

established federations creating new CUs or changing existing ones. It is important for a constitution to have rules dealing with this. These are discussed briefly in a separate section below.

4. Procedures for Drawing a New Political Map

Formerly unitary countries that embark on federalism or political devolution have adopted quite varied processes for determining their new political maps. This can reflect the larger circumstances of how their constitution is being prepared—e.g. by a dominant party or authority, through negotiations of strong parties, or by a constituent assembly in which power is quite diffused—as well as their sensitivity to public opinion. In some cases, special procedures have been adopted to deal with the issue of drawing the political map.

4.1 LARGELY TOP-DOWN PROCESSES

1. The Ethiopian governing coalition did soundings amongst its allies, but the leadership effectively decided what the new states would be. Similarly, the Nigerian military leaders made the decisions on new state creation, though they did have some input from advisory or consultative groups.
2. In Yemen, an extensive national dialogue process failed to resolve the issue, so the president established a commission to make a recommendation. It quickly proposed 6 regions, which had been the preferred option of the President who had consulted with key political leaders. This outcome is the basis for the current drafting of the constitution, but it remains controversial.

4.2 TOP-DOWN DECISION, BUT WITH SIGNIFICANT CONSULTATIONS

1. South Africa created an advisory commission made up of representatives of the key negotiating parties and some different interests; it was supported by a technical committee. The

commission's initial recommendations, based essentially on a map of economic development regions, were controversial, but were accepted, subject to some modification, after negotiations amongst the main parties negotiating the constitution. The definition of the provinces was then included in the constitution that was ratified by an elected constitutional assembly. There have been minor boundary revisions since then, subject to the agreement of the provinces concerned and the national parliament.

2. India's major state reorganization was initially led by a commission that conducted hearings and received thousands of submissions. Its recommendations were adopted by the Parliament with minor modifications. The Parliament at the time was dominated by one party.

4.3 TOP-DOWN PROCESS AND CRITERIA, WITHIN WHICH REGIONS HAVE SOME CHOICE

1. Spain's national parliament established criteria for new autonomous communities, which were to be formed from existing provinces or combinations of provinces with no boundary changes. Some provinces had the right to become autonomous communities themselves, while others could only do so in combination with others. Elected representatives within each province were then given a brief period to decide their preference, which was then subject to review and ratification by the national parliament. In a few provinces, the public was consulted by referendum. The constitution provided the procedure for establishing autonomous communities but the autonomous communities themselves are not named or defined in the constitution. The constitution was ratified by the parliament and then in a national referendum in 1978.

4.4 TOP-DOWN PROCEDURAL RULES ON REGIONAL DECISION-MAKING, BUT NO SUBSTANTIVE CRITERIA

1. Iraq's constitution establishes the procedure for determining regions, but it does not name them and none have been established outside Kurdistan. It permits one or more provinces to become regions (the federal CU), and all provinces have the right to become regions without combining with others—in contrast with Spain, where only some with special characteristics have this right. The Iraqi process can be initiated by a third of the council members of each province or a tenth of votes by petition of each province intending to form a region. This would lead to a referendum on establishing a region, which would then pass by a simple majority. (The constitution permitted the national Council of Representatives to enact a law on the formation of regions within six months of the constitution's coming into force, but such a law was never passed.) To date no new region has been formed, partly because of federal government resistance. There had been some discussion of all of the South of Iraq joining to form a super-region. The rules would permit this, but it would meet strong political opposition.
2. Somalia's interim constitution provides for local representatives of formally existing regions to decide on uniting to form new member states. At the same time, there is to be a boundaries commission that seems to have some latitude to suggest modifications. The process has not begun.

It is striking that none of these processes are purely "bottom-up" in the sense that no country during the transition to federalism permitted populations to draw a line around a territory of their choice and then to form a CU or to choose what CU they wished to be part of. The country that came closest in this regard during its transition to federalism was Iraq, whose rules gave the population within each province the choice of whether to become a region or merge with another; however, such populations or sub-populations within provinces could not alter existing provincial boundaries

other than by merger. While the initial formation of states in Ethiopia was largely top down, the rules in its constitution for future CU formation are more permissive, as are those for Germany, as discussed below in the section on incremental CU formation. It is interesting that neither Iraq nor Ethiopia have actually followed through on the rather permissive rules they have set out.

In fact, it is hard to imagine how a purely bottom-up process might work in drawing a totally new political map, given the possibility that groups in different parts of the country or even within areas with distinct sub-populations might have strongly conflicting views. Thus the processes adopted involved either centralized decision-making, which may have come after consultations of whatever quality, or decentralized decision-making within very narrowly defined options, such as the possible merger of one existing unit of some kind with another. Even such decentralized processes, as in Spain, could lead to conflicting results, e.g. if one area votes to merge with its neighbours, but the neighbours vote to stay separate or merge with another area. Thus a procedure that permits some degree of local decision-making is more likely to succeed if it is evident that there is consensus in the regions concerned.

5. Constitutional Provisions about Changing or Adding CUs

In many federations, the number and boundaries of constituent units is politically settled beyond dispute. However, even some long-standing federations have had pressures to create or merge CUs which they have had to deal with. Switzerland created a new canton in 1977 (and there is still a debate about its boundaries). Russia had five mergers of CUs between 2005 and 2008 (reducing their number to 83). India split a state into two in 2014. Germany had a referendum on merging two provinces in 1996. Nigeria has constant demands for new state creation.

The rules governing the creation of new CUs or the modification of CU borders within federations vary considerably. When drafting a constitution, attention should be paid to this question. There are two broad approaches to this, legislative-based and referendum-based procedures.

In the legislative-based procedures, the decision to create a CU or change boundaries can be assigned:

1. To the national legislature alone as in India (by simple majority of the two houses of Parliament) or in Kenya (by a two thirds majority in both houses, acting on a resolution recommended by an independent commission) or in Belgium (a majority of members from each linguistic group plus a two-thirds majority);
2. To the national legislature plus the affected CU or CUs as in Australia and the United States (by simple majority of legislatures at both levels) or in Pakistan (a two thirds majority in both federal houses and the affected provincial legislature(s));
3. To the national legislature plus the affected CU or CUs plus some majority of all CUs as in Canada (a simple majority in the legislatures affected in the national parliament plus a majority in the legislatures of at least two-thirds of the provinces representing at least fifty percent of the population).

The referendum-based procedures are often quite complicated in that they may also provide for a right of initiative as well as a role for legislatures.

1. Thus Germany permits ten percent of the population in a contiguous area of a million people or more to initiate an advisory referendum on creating a new province. A referendum shall be held not just in the area of the potential new province, but also in the remaining areas of any affected existing province. It shall pass with a simple majority in both areas, but if the affected areas vote no, it shall require a two-thirds majority in the area of the proposed new province.
2. In Switzerland, a cantonal legislature must approve any change to its boundaries. In practice, one canton held a series of referendums to determine what parts of the canton wished to form a new canton. Once a canton has approved a new canton being formed from its territory, that decision must also be confirmed in a national referendum.

3. Iraq gives the initiative for triggering a referendum to a certain proportion of elected officials or voters by petition, but once a referendum is to be held, it passes by an overall majority (even if, it appears, in the case of a merger one province votes against).
4. Nigeria has the most complicated procedures of all. A proposed new state creation must be initiated by the written support of at least two-thirds of the members from the proposed area of the new state who are in the national and state legislatures as well as local government councils. This would lead to a referendum that would require a two-thirds majority. A positive result could then be approved by a simple majority of all the states plus a two-thirds majority of both houses in the federal parliament.

The Indian procedures were designed to make new state creation relatively easy, which made sense given the need to restructure the initial map and to respond to the continuing change in this vast federation. Thus the initial state reorganization created 14 states, but over time the number has grown to 29, which is still modest in a country of over a billion people. By contrast, the Nigerian procedures were designed to make new state creation extremely difficult, given the large number of demands for new states and the fact that the country already has 36 states. Each country must consider its own needs and pressures.

6. Some Conclusions and Possible Lessons

Drawing a new political map as part of federalizing or political devolution can present special challenges. Each country will choose its method depending on the politics at the time. A government with a clearly dominant party or regime might proceed with limited consultation. If major parties are negotiating a new constitution, perhaps as part of a peace settlement, the issue will likely be negotiated, but it can be aided by an advisory commission that may engage in consultations or technical studies. A constituent assembly may negotiate CU definition amongst the parties, again with support from an advisory commission. In certain limited circumstances, local

authorities or voters may be allowed to choose amongst options (e.g. with whom to merge).

It is possible to delay some aspects of defining the new political map, but a federal system cannot become operational without the existence of CUs throughout most of the national territory.

It is helpful to set out certain principles regarding the nature of the federation and the criteria for creating CUs as was done in South Africa, with the ten criteria that were clustered into four generally classes. The criteria will often involve a mix of factors, including some accommodation of territorially concentrated populations. The use of historical territorial delimitations can be particularly helpful in avoiding a need to draw entirely new boundaries based on demographic, economic or other criteria. And the political agreement on the CUs, indeed on federalism or devolution, will be aided by avoiding a narrow approach of ethnic federalism; minority communities who are to live in regions dominated by another majority are more likely to accept federalism if their rights—including some cultural rights—are protected and they receive equal treatment as citizens and, if appropriate, some services in their languages.

Constitutions should specify rules for incremental CU creation or boundary modification. Key issues include rules on initiative, who decides and by what majorities. The choice of threshold—low or high—for new CU creation should reflect the anticipated needs of the federation.