

Comparative Judicial Politics and the Territorial Arrangement of the Political System

Another key set of institutional choices when fashioning together a political systems is: (1) the structure and the role of the judicial system and courts; and (2) the relationship between the central government and local governments. In this chapter we will explore how different judicial systems are structured, the role played by judicial independence and judicial activism, and the effects of courts on the development of democracy. The chapter then will turn to a discussion of the various ways in which the relations between the central government and the local governments can be structured, particularly via unitary systems, federalism, and confederal arrangements.

Judicial Systems

As C. Neal Tate (1992) has noted, the comparative study of courts by scholars has had a long tradition in political science. Although the role of courts in democracies was a favorite topic of the discipline in the earlier part of the twentieth century, the coming of the behavioral revolution pushed the study of courts to the sidelines. However, by the late 1960s, the behavioral study of the courts began again, and since then there has been a considerable amount of new work on the role of courts in democratization and democratic consolidation.

To understand the role courts play in the democratic process, it is first necessary to have some idea of what one means by a “court.” Becker (1970, p. 13) defined a court as

a man or body of men [sic] ...with power to decide a dispute, before whom the parties or advocates or their surrogates present the facts of a dispute and cite existent, expressed, primary normative principles (in statutes, constitutions, rules, previous cases) ... and that they may so decide, and as an independent body.

Shapiro (1981) contended that courts serve three primary functions in democracies – the resolution of conflict, social control, and the making of laws. By *law-making*, Shapiro meant that courts not only shape policy by filling in the gaps in existing statutory law (via judicial interpretation of the law) but also can create law and policy via court rulings on issues such as constitutionality of existing laws, or judicial review.

Although all courts may have similar functions, there is wide variation in terms of legal traditions and judicial structures (Weiden, 2010). In general there are three types of legal traditions that can be found in the world – common law, civil law, and religious law. *Common law* legal systems are found primarily in Anglo-American nations, and is generally based on the idea of precedent, that is legal rulings should be based upon the principles established by previous court cases. Judges have considerable flexibility in interpreting precedent, and hence considerable autonomy in making rulings. On the other hand, *civil law* systems, which are found in much of the rest of the world (particularly in continental Europe and Latin America) rely more on the use of specifically codified laws and written rules that guide judges in their rulings. This provides relatively little latitude for judges in interpreting law. *Religious law* systems (such as Sharia law, found in some Muslim states) rely extensively on sacred texts to direct judges in their legal decisions (Merryman, 1985).

Courts and judicial review

Beyond different legal traditions, there are also very different ways to organize court systems, largely based on the principle of judicial review. For instance, there is a distinction between “European” and “American” models in terms of how courts are structured and how they deal with the principle of *judicial review*, or the ability of a court to overturn a piece of legislation, an act of the executive, or a lower court decision. Most countries have some form of judicial review, but two notable exceptions are Great Britain and the Netherlands, where the courts are not charged with the power to review the constitutionality of statutes.

The tradition of judicial review has long historical roots. Early forms of constitutional review existed in France by the middle of the thirteenth century. Similar codes regarding judicial review were introduced in Portugal in the seventeenth century and later in the constitutions of Norway, Denmark and Greece in the nineteenth century. In 1867, the Austrian State Court acquired the power to make decisions on constitutional complaints. While the current British system does not have constitutional review, there certainly are precedents for the idea for judicial review, that is, the principle of the supremacy of the law over the acts of the Crown. However, the major defining moment for the development of constitutional review was exerted by the famous *Marbury v. Madison Case* (1803), in which the Supreme Court asserted the power of judicial review. This set the precedent for the US Supreme Court to carry out the judicial review of statutes (Capeletti, 1994).

Generally judicial review can take a number of different forms, but the two primary dimensions to distinguish different forms of review are:

- 1 *A posteriori* (or *concrete*) review versus *a priori* (or *abstract*) review. This principle is used in the United States, but also is enshrined in the Japanese Constitution, and in Denmark, Estonia, and several countries in Africa. In *a posteriori* review, judicial review occurs only after law has taken effect and there has been a concrete case brought before the court to review. On the other hand, in *a priori* (or *abstract*) review, the judicial review may take place before a law takes effect and thus without an actual case or controversy brought before the court (Stone, 1992). However, generally in such systems, courts also rule *a posteriori* as well as *a priori*. Such systems exist in Austria, Portugal, Spain, Germany, and in France, as well as in most of newly democratizing states of Central and Eastern Europe.
- 2 The *all courts model of judicial review* (used in the United States) versus *concentrated* or *constitutional courts model of judicial review*. In the former (as in the United States), both higher and lower courts can declare a statute unconstitutional, whereas in the latter, a special court is charged with rendering decisions on the constitutionality of laws and statutes (Tate, 1992).

Judicial review, or a court's power to invalidate a legislative or executive act on grounds of its unconstitutionality, is structured very differently in Europe than in the United States. First, in European systems, the form of constitutional review takes the form of an *abstract review*. When

constitutional courts practice abstract review, they need not examine the specific circumstances of a particular case. In other words, the court can rule on issues of principle that are not being raised in the case. In the United States, however, review can only be in concrete form, or only in the context of a particular case brought before the courts.

The second difference is that the European model features a concentrated, or centralized, system of review. Under a system of concentrated judicial review, only specialized courts that have been specifically created to decide constitutional issues can exercise constitutional review. Thus, while the US system of diffuse judicial review authorizes all courts to consider the constitutionality of legislation, the European model concentrates the power of judicial review in one court. Although, ordinary European courts generally are not permitted to exercise judicial review of constitutional questions, these courts may be allowed to refer such issues to constitutional courts for decision.

Courts and independence

In addition to issues of judicial review (and the structures performing the function of judicial review), there is also the issue of *judicial independence*, or the extent to which the judicial authorities are shielded and independent from other political actors. In other words, can judges make decisions without being influenced by policy-makers and elected officials? Generally, one would want judicial independence to act as the neutral arbitration and conflict resolution function that was identified by Shapiro (1981).

A number of institutional characteristics can increase the level of independence of the courts. First, there is life tenure or very long terms for judges (rather than fixed shorter terms), which is designed to ensure that they are insulated from potential retaliation from other political actors. To a large extent, the longer the term of the judges, the more likely they will be to possess some degree of independence from other actors. However, to some extent this depends on how long the term is relative to the terms of other actors. For instance, if the term of judges is *less* than a single parliamentary term, then parliament has a theoretical opportunity within a single session to punish a judge via removal or non-renewal (Smithey and Ishiyama, 2000).

A second institutional characteristic relates to the number of political actors involved in the nomination and confirmation processes when judges are selected for office. It is likely that judges who are selected as the result

of a process which involves several political actors possess far more potential independence than judges who are all selected by the same actor.

There is also the question of who controls judicial procedure, that is, who sets the rules for the proceedings of court cases? A constitutional court that determines its own procedures is likely to possess considerably more potential independence than one that has all of its procedures determined by another political actor.

Finally, there is the degree of difficulty in removing judges from office. The easier the constitution makes it to remove a judge, the less independent the judges will be. With regard to removal, we consider constitutional vagueness to be to the advantage of judicial independence, since such vagueness allows judges to interpret vague constitutional provisions to their benefit (Smithey and Ishiyama, 2000).

Although judicial independence may be related to judicial activism, independent courts are not necessarily active in their exercise of judicial review. For instance, Ginsburg (2003; see also Epstein *et al.*, 2001) found that in the early years of a court's existence, judges in these developing nations are less likely to make rulings that challenge other political actors. Similarly Smithey and Ishiyama (2000) found that in post-communist Central and Eastern European countries, the extent to which courts in these countries were judicially independent did not really explain whether they exercised judicial review.

The judicialization of politics

Recent comparative works have suggested that there has been an increase throughout the world of what some have referred to as the "judicialization" of politics (Stone, 1992; Tate and Vallinder, 1995). That is, courts have increased their influence over the policy process and politics generally. For instance, Tate and Vallinder (1995) argue that politicians adjust their policy positions in advance of adoption of legislation in order to avoid nullification by the courts (see also Shapiro and Stone, 1994). Martin Shapiro and Alec Stone note that judges in some European constitutional courts "actually provide the draft statutory language that the judges say they would find constitutional" (1994, p. 404) to legislators, thus having a direct effect on the legislative process.

Further, Stone (1990) argues that judicial power has also expanded most significantly in Europe with the cooperation of other policy-makers, through the use of the reference procedure. As he notes,

Referrals to courts act as a kind of jurisprudential transmission belt: the more petitions the court receives, the more opportunity they have to elaborate jurisprudential techniques of control; this elaboration, in turn, provides oppositions with a steady supply of issues, expanding the grounds of judicial debate in parliament and in future petitions. (Stone, 1990, p. 90)

The process of judicialization has also led to greater attention being paid to the “constitutionalization of politics” or the focus on the “politics of rights.” For instance, Shapiro and Stone (1994, p. 417) describe this process when they note that constitutionalization of politics

comes to infect the entire political system because opposition political parties, lawyers, citizen groups, and others can see that rights claims are an effective avenue of social change. These actors have become, in essence, the political constituencies of the judges and of constitutional review.

In part, this explosion in rights-based claims is due to what Epp (1998) calls the increase in the “support structure” for legal mobilization. By “support structure,” Epp refers to the financial resources and legal expertise that allow litigants to pursue claims that they almost certainly could not finance on their own.

Finally, the judicialization of politics has been spread internationally by the influence of the developing system of supranational judicial structures. These include the European Union tribunals such as the European Court of Justice, the European Court of Human Rights, and the International Court of Justice, whose rulings are now used as precedent in cases before European constitutional courts (Weiden, 2010). Additionally, the European Conference of Constitutional Tribunals, which is composed of all the presidents of the highest courts in Europe, meets regularly at conferences in which their rulings are discussed among each other. Thus, the constitutionalization of the political process is being encouraged at the supranational level as well.

Trial courts and juries in comparative perspective

In the literature on comparative judicial politics, most of the focus has been on high courts, or the general features of the judicial system. However, there has been relatively little work on comparative trial courts. As Weiden (2010) notes, this is somewhat surprising given that there are rather substantial differences between how trials are conducted in Anglo-American countries

and those procedures used in the rest of the world. For instance, the trial system employed in Anglo-American countries such as Canada and the United States is known as the *adversarial model* and is based on the premise that truth in a court case will emerge as the result of direct competition between the litigants, and the arguments are then evaluated by a jury.

In most of the rest of the world, the trial procedure is referred to as the *inquisitorial model*. This system is based less on confrontation and is more akin to an investigation where the judges control the proceedings, call, and question the witnesses, and make the ultimate determination in the case. These fundamentally different approaches towards trial procedures have prompted some interesting research into the differential effects of adversarial and inquisitorial systems. For instance, Bruno Deffains and Dominique Demougin (2008) and Block and Parker (2004) conducted research analyzing whether the adversarial or inquisitorial trial system tended to be more equitable; they found that the adversarial trial system could lead to inequality in treatment of litigants, particularly in criminal cases, whereas inquisitorial systems tended to be more equitable in treatment of litigants.

Courts and democracy

Although there has been a growing literature on how the actions of other institutional actors have affected the process of democratic consolidation (such as presidentialism, multipartyism, and the drafting of electoral laws), there has been remarkably little work done that investigates the impact of judicial action.

Understanding the effects of judicial intervention is important to understand the process of democratic consolidation. Given that democratization is a delicate process during which democratic procedures of government are established and maintained, the promotion of the rule of law is an essential task facing these transitional regimes. This is because the submission of the state to law helps the newly democratizing states achieve two crucial goals: (1) a clear break with the authoritarian past; and (2) the development of a culture which teaches state actors that the legal bounds of the system cannot be ignored for the partisan political gains. The significance of the establishment of the rule of law in newly democratizing countries creates a crucial point for the courts in transitional countries, inasmuch that the judicial branch is the institution charged with the enforcement of the constitution, rights, and other democratic procedures (Larkins, 1996).

The possibility of judicial activism in democratizing countries raises important questions about the legitimacy of judges as policy-makers. Many scholars cautioned against creating too much judicial power in new democracies, agreeing with Landfried that judicialization is “dangerous for democracy” (Landfried, 1985, p. 522). Two main reasons were offered as to why strong judiciaries would be inimical to the development of democracy. The first was that the new constitutions entrenched the power of judicial review (allowing judges to act in a counter-majoritarian fashion) while insulating judges from political pressure – a combination that contradicts the modern push for democratic accountability. The second complaint was that increased judicial power reflected a failure of more accountable political institutions. Some scholars see increased judicial power as symptomatic of democratic breakdown, since transferring disputes to the courts allows elected decision-makers to dodge controversial policy questions (Linz, 1978; Valenzuela, 1978). Others argue that transferring decision-making authority from the legislatures to the courts decreases a society’s ability to achieve political conciliation. Judicial decisions, emphasizing rights and zero-sum solutions at the expense of compromise, can harden conflict and escalate partisan-ideological disagreement – a particularly dangerous situation in new democracies. From this perspective, increased power for courts signifies an increasing crisis of democracy.

The foregoing criticisms are based on a procedural critique “that having important policy matters decided by non-majoritarian institutions like courts is inherently undemocratic and damaging to the legitimacy and effectiveness of majoritarian institutions like legislatures and elected executives” (Tate, 1997, p. 280). This approach ignores the democracy-enhancing role that courts can play. Other scholars argue that judicial power can be good for democracy, at least if exercised in particular ways. Judges may help keep the democratic process open and fair, by protecting minority rights and making sure that no one is excluded from participation (Ely, 1980; Melone and Mace, 1988). The presence of judicial review may also encourage faith in democracy since it suggests respect for limited government and the rule of law (Shapiro, 1999). From this perspective, a healthy democracy actually requires an active and independent judiciary (Tate, 1995).

The Territorial Arrangement of the Political System

One of the basic challenges in organizing a political system is how power should be territorially or spatially divided. Indeed, the vertical division of

power (that is, between central, regional, and local authorities) is as important a consideration for constitutional engineers as is the horizontal division of power between the various branches of government. With rise of the political relevance of ethnicity and nationalism in the late twentieth and early twenty-first centuries, the issues of decentralization and deconcentration of power has become even more important, from the rich developed countries of the West (such as the United Kingdom, and the European Union itself) to poorer developing countries like Ethiopia.

In the comparative politics literature on the spatial dispersion of power, there have generally been three ways to classify different kinds of states. These are *unitary*, *federal*, and *confederal systems*. There are of course variations within each type, but each type represents distinctly unique ways to structure relations between the central government and regional and local political authorities.

Unitary systems

Unitary systems are characterized by the concentration of powers in the hands of the central government. Important powers such as law making, revenue raising, and defense powers are the purview of the central authorities. Although there may be regional subnational units in the country, the powers that these regional or local governments possess are delegated to them by the central government. Most of the states in the world are unitary systems in one way or another, and include countries such as France, Japan, and the People's Republic of China. The United Kingdom has also historically been a unitary state, but has experienced significant devolution of power (since 1997) to regional governments in Scotland, Wales, and Northern Ireland, including the power to tax in the case of Scotland. Significant devolutions of authority from national to subnational levels have occurred in Africa (for example, Côte d'Ivoire, Ghana), Asia (for example, Bangladesh, India), Europe (for example, Belgium, Britain, France, Italy, and Spain), and Latin America (for example, Argentina, Colombia, and Mexico) (Elazar, 1996).

There are a number of cited advantages to a unitary state (see Hague *et al.*, 1998). These include clarity in the lines of political accountability, greater coordination of policy and ability to ensure equality in treatment of all parts of the country via the uniform application of laws and policies, and the promotion of political unity in the face of regional or ethnic differences. However, there are many cited disadvantages as well. Among the

most important are the difficulty in accommodating local differences (or the sense that local interests are trampled under the weight of national interests) and the excessive concentration of power and the emergence of a bloated central bureaucracy.

Federal systems

Federal systems involve shared rule between the central government and regional and local governments. For Riker (1964, p. 11), a system is federal if:

- 1) two levels of government rule the same land and people, 2) each level has at least one area of action in which it is autonomous, and 3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.

Thus, power is shared across different levels of government, and this distribution of powers is defined constitutionally as opposed to being due to the discretion of the central government (Downs, 2010).

Federalism takes a wide variety of forms, although there are some central features that generally characterize this type of system. First, most all federal systems have a bicameral legislature, largely so that the upper house can represent state, regional, or provincial interests (Downs, 2010). This is the case in countries like the United States, Germany, Russia, and Mexico. Second, generally the courts in federal systems have the important role of adjudicating and mediating disputes between regions (although sometimes this power is shared with other branches, such as in the Russian Federation where the president has the power to adjudicate regional disputes).

Generally federalism tends to exist in countries that are quite large and populous (such as the United States, Germany, Brazil, and Mexico) and/or countries that also have significant ethnic, linguistic or regional differences (Russia, India, Canada, Belgium, and Ethiopia). Federalism has been praised as promoting consensus in culturally divided societies (Lijphart, 1999) and facilitating local responsiveness. However, federalism has also been criticized for being overly redundant in terms of multiple bureaucracies (national, state, and local), overlapping and unclear jurisdictions, and being excessively slow to act, due to multiple decision-makers (or “veto players”). Further, federalism has been thought of as promoting regional or ethnic separatism, because it creates institutional and regional bases as “jumping

off” points for secessionist movements. Indeed, regional and provincial identities persist as challenges to national unity under federal systems.

There are also different types of federal systems. One of the classic ways to categorize different forms of federalism refers to the relationship between the central government and regional and local governments, or the extent to which power is shared. For instance, *dual federalism* is a theory about the proper relationship between government and the states, portraying the states as powerful components of the federal government – nearly equal to the national government. Dual federalism (Schütze, 2009) is composed of four essential parts:

- 1 The national government rules by enumerated powers that are only specifically listed in a constitution.
- 2 The national government has a limited set of constitutional purposes.
- 3 Each government unit – national, regional, local – is sovereign within its sphere.
- 4 The relationship between national and regional governments is one of managed tension rather than cooperation.

Dual federalism tends to emphasize the importance of regional authorities and emphasizes state rights relative to the central government. Centrally important is the idea that regions or states reserve powers to them that are not specifically granted to the central government by a constitution. Under the conditions of dual federalism, a rigid wall separates the central government from the regional and local governments.

Cooperative federalism (Schütze, 2009) refers to the cooperative relationship between the regional and central governments, or powers that are shared between the two levels. This system is defined by three core elements:

- 1 National and regional agencies typically undertake government functions jointly rather than exclusively (such as education, or health).
- 2 The central and the regional governments routinely share power.
- 3 Power is dispersed in such a way as to provide citizens with access to many venues of influence.

Generally, the distinction between dual and cooperative federalism is associated with studies of US politics, and generally refers to only the dispersion of power from the center to the regions. On the other hand, Arend Lijphart

(1999) has offered a very different way of differentiating between types of federalism, noting the difference between *congruent* and *incongruent* federalism. Essentially, this distinction refers to whether there is more or less regional distinctiveness relative to the features of the central government. Congruent federalism is the situation where each of the regional sub-units is essentially a smaller replica of the whole. Thus, for example, the classic case of a congruent form of federalism is the United States, where the individual states are replicas of the nation as a whole. Each state is culturally heterogeneous (as is the nation as a whole) and the state governments tend to be mirror images of the central government (complete with bicameral legislatures, mini-presidential systems – led by governors). On the other hand incongruent federalism is where each of the sub-units represents a distinct subsection of the whole. Countries that exemplify cultural homogeneous regions that together make a broader heterogeneous whole include Canada (with the combination of French-speaking Quebec with the rest of English-speaking Canada) India, and Belgium (with the combination of the Dutch-speaking Flemish and the French-speaking Walloons). Lijphart saw some advantages for the use of incongruent federalism, particularly in ethnically or culturally divided societies. Indeed, this system ensures political representation and control for sub-groups in society, and thus can serve to create stability in an otherwise volatile society if there are longstanding tensions or conflicts between groups.

Some argue that ethnically based federalism (a form of incongruent federalism) is a way to prevent ethnic conflict and promote the unity of a multi-ethnic state. Ethnic- or identity-based federalism is appealing to many developing countries, particularly in the post-colonial context. A state adopting an ethnic-based federal system gives the “nations” within its borders some degree of self-governance as regions or states in a federal system (Smith, 1995; Tully, 1995).

Examples of emerging ethnofederal systems are Belgium, Bosnia-Herzegovina, and Ethiopia (and potentially Iraq). Perhaps the most extreme form of ethnofederalism has occurred in Ethiopia. In 1991, following the collapse of communist rule, Ethiopia established a federal system creating largely ethnic-based territorial units. The development of ethnic-based federalism was consistent with traditional program of the Tigrayan People’s Liberation Front (TPLF) (which had favored the self-determination of ethnic groups during the war against the Derg) and its framers claimed that only through ethnic and regional autonomy would it be possible to maintain the Ethiopian state as a unified political unit. The initial process

of federalization lasted four years, and was formalized in a new constitution in 1995 (Mengisteab, 1997, 2001; Habtu, 2005; Kellor and Smith, 2005). The traditional Ethiopian provinces were recombined into nine ethnic-based regional states and two federally administered city-states. The regional states that formed the federation in 1991 were: 1. Tigray; 2. Afar; 3. Amhara; 4. Oromiya; 5. Somali; 6. Benishangul-Gumuz; 7. Southern Nations, Nationalities, and Peoples Region (a merger of five regions); 8. Gambella; and 9. Harari. Addis Ababa and Dire Dawa were made federal cities with a special status. The result has been the development of an asymmetric federation that combines populous regions like Oromiya and Amhara in the central highlands with sparsely populated and underdeveloped ones like Gambella and Somali. Although the constitution vests all powers not attributed to the federal government in them, the regional states are in fact quite weak and subject to political manipulation by the central state (Chanie, 2007, 2009). However, each region has the ability to institute its own official language, and one of the largest, Oromiya, has not only adopted its own language as the language of the state, but also has abandoned the traditional Ethiopian (Amharic) script for a written language based on the Latin alphabet.

Iraq is another example of a potentially ethnofederal state. In Iraq, the principle of federalism was proposed and adopted in 2005 as a way to solve the inherent crisis in modern Iraq and potentially to address the significant regional and sectarian divisions between Kurds and Arabs, and Shiia and Sunni Muslims. Although Kurdistan's autonomy in the federation was acknowledged, the federative form of the rest of the country remains largely undetermined. Currently, the constitution allows for the formation of autonomous regions from the one or more existing governorates (provinces) or two or more existing regions. There is no limit to the number of governorates that can form a region. Once formed, each new autonomous region can elect its own president and its own legislature. Although such regions have not yet formed, the current proposed ones include the creation of homogenous Shiia regions in the South. This has sparked considerable debate as to whether federalism in Iraq will be based largely on ethno-sectarian lines.

Lijphart also notes that there are some additional characteristics (or "secondary characteristics") of federalism. These institutional features generally ensure that the federal system will persist (that is, that the national majority will not be able to move power away from the federal units and back to the central government):

- bicameralism with a strong federal (territorial) chamber;
- a written, rigid constitution;
- a judicial review to ensure constitutionality of legislation.

Another distinction in the political science literature on federalism deals with the status of different regions, or the difference between *symmetric* versus *asymmetric* federalism (Elazar, 1991; Stepan, 1999). Symmetric federalism is where all regions or states have the same status and no distinction is made between the constituent states. A classic example of the symmetric federalism is the United States (although certainly there are units that comprise the country, such as the District of Columbia and Puerto Rico, that have a different status when compared to the states). Asymmetric federalism is where different constituent regions possess different powers: one or more of the regions, states, or provinces has considerably more autonomy than the other sub-states, although they have the same constitutional status. Thus, in contrast to a symmetric federation, where no distinction is made between constituent states, in asymmetric federals there is such a distinction.

Two examples of asymmetric federalism include India and the Russian Federation. In India, the federal union is made up of 28 states and 7 union territories (that generally are smaller and less populous, but includes the national capital territory of Delhi). States are generally self-governing with executives and legislatures elected locally, whereas Union Territories are administered directly by the national government (although the Union Territories of Puducherry and Delhi now have the right to elect their own legislatures). Further there are differences among the states as well, with special provisions that provide degrees of autonomy over cultural and educational affairs for Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland, and Sikkim. Further Jammu and Kashmir are subject to special provisions under Article 370 which specifies that except for Defense, Foreign Affairs, Finance and Communications, the Indian government needs the State Government's concurrence to apply all other laws. Thus, residents of Jammu and Kashmir live under a separate set of laws (for example, citizenship, ownership of property) than other citizens of India (Johnson, 1996).

The Russian federal system, like that of India, is far more complex than that of the United States. The Russian Federation is currently divided into 83 "subjects" of the federation (reduced from 89 up until 2004). Of these, 46 carry the official name *oblast* (in English also translated as "region"); 21

are republics (*respublika*) which are technically tied to the Russian Federation via a series of bilateral treaties concluded in the 1990s; 4 are autonomous districts (*avtonomny okrug*); nine are territories (*krai*); two – Moscow and St. Petersburg – are federal cities; one is an autonomous region (Jewish Autonomous Oblast/Birobidzhan). Generally there is little distinction between *oblasts* and *krai* in terms of governing structure. Both have their own governors (which up until 2003 were directly elected) and their own legislatures. Autonomous districts are generally sparsely populated, and reserved for tribal peoples of the North (in many ways somewhat similar to the status of native peoples in North America, but with much less political autonomy).

The very different feature of the Russian Federation (and perhaps most asymmetric feature of Russian federalism) is the existence of the 21 republics. The republics are organized along non-Russian nationalities, and include Adygea, Altai, Bashkortostan, Buryatia, Republic of Dagestan, Ingushetia, Kabardino-Balkaria, Kalmykia, Karachay-Cherkessia, Karelia, Komi, Mari El, Mordovia, Sakha Yakutia, North Ossetia-Alania, Tatarstan, Tuva, Udmurtia, Khakassia, Chechnya, and Chuvashia. Each is headed by an elected President, and is bound with the Russian Federation as equal partners with the Russian State, in a voluntary treaty arrangement. Republics differ from other federal subjects in that they have the right to establish their own official language and have their own constitution. Other federal subjects do not have this right. The level of actual autonomy granted to such political units varies but is generally quite extensive. The parliamentary assemblies of such republics have often enacted laws which are at odds with the federal constitution. In the 1990s there were also fairly strong secessionist movements in Chechnya, Bashkortostan, Tatarstan, and Sakha, but only in Chechnya did this turn violent.

Confederal systems

Finally, there are *confederal systems* which are far less common than either unitary or federal systems (Forsyth, 1981). Examples are mainly historical and are most frequently associated with the United States under the Articles of Confederation (1781–1789), the Confederate States of America (1861–1865), Switzerland (1291–1847), the Commonwealth of Independent States (the former USSR), and the emerging European Union (EU).

In confederal systems, a central government coexists alongside subnational units, but in this model, the provincial, regional, or state governments

are much stronger than the national authority. The central government relies heavily on the resources and authority of the subnational units and is otherwise powerless to act without the consent of the states, regions, or cantons. Generally in a confederation, the participation in national politics is voluntary on the part of the subnational units, and they are generally free to leave the arrangement at will (although in practice there were some restrictions on leaving a confederacy). Typically, national level decisions require the unanimous agreement of the subnational unit, which makes individual states important veto players in country-wide decisions. In short, a confederal arrangement is really an alliance of independent political entities, and emphasizes local autonomy, although the central government is afforded some limited powers (such as national defense and the conduct of foreign policy).

One of the great weaknesses of confederal systems is that they struggle mightily when weak central governmental authorities are unable to enforce national laws, generate resources or to adjudicate disputes between regions, states, or provinces. Further, they struggle mightily even when attempting to perform basic functions assigned to it (such as national defense and foreign policy). Indeed, these problems explain why, in the modern era, confederations exist in only a few isolated places in the world.

Evolution of unitary and federal states

In recent years many changes have occurred in existing unitary and federal systems. In particular, many unitary systems have transformed into less centralized forms. Much of this was a product of the adaption to the economic contractions beginning the 1970s designed to pass on programmatic and bureaucratic burdens to regional and provincial governments. A second factor was that opposition groups pushed to dismantle unitary states as a campaign promise to mobilize votes (as with the Labour Party in the United Kingdom, relative to Scottish and Welsh autonomy) and once in power sometimes delivered on their promises (Ishiyama and Breuning, 1998). For other cases, decentralization has been driven by the desire to pacify persistent regional nationalisms (as in Italy). These persistent regionalisms have been assisted by the opportunities afforded by new forms of supranational governance (such as the European Union) to embolden subnational movements to seek greater local autonomy (Kincaid and Tarr, 2005).

Thus, many unitary states have experienced a “devolution revolution” of sorts (Hueglin and Fenna, 2006). For instance, in the United Kingdom,

the Labour Party, which had lost four consecutive general elections in the 1980s and 1990s, seized on the issue of decentralization as a popular campaign pledge in 1997, and then adopted this as policy once in power. This was particularly popular in Scotland where the discovery of North Sea oil in the 1970s – with its potential for revenues – had fueled a resurgent Scottish nationalism (Ishiyama and Breuning 1998). Cultural autonomy was popular in Wales. With devolution as a centerpiece of Prime Minister Tony Blair's new government, Northern Ireland's elected Assembly convened in 1998 (only to be suspended by London on many occasions from 2002 to 2007) and new Scottish and Welsh parliaments were elected in 1999. However, devolution has not moved in the direction of federation as the local assemblies remain subordinate to the national government.

In France, devolution occurred largely as the result of the Socialist Party's belief that democratization could be furthered through decentralization of the French unitary state. French Socialists, led by President François Mitterrand, after 1981, created 26 directly elected regional councils (each with an indirectly elected president) (Tiersky, 2002; Hueglin and Fenna, 2006). In Italy, social pressures from below were certainly present in the 1970 reforms that created and devolved powers to new administrative regions although decentralization has had greater success in the north, and less in the south of the country (Putnam, 1994).

At times, the development of decentralization and federalism is a natural consequence of development or, as Ivo Duchacek (1970) points out, there may simply be no practical alternative to the adoption of federalism. Belgium is a case in point. Since its foundation in 1830, Belgium was a classical unitary state sitting atop a combination of very different linguistic communities – French-speaking Wallonia and a Dutch-speaking Flanders. Although traditionally politically dominant, over time the Wallonia region fell behind Flanders in the twentieth century, as Flanders became more economically vibrant. This new economic reality led to greater demands by the Flemish population, which resulted in constitutional reforms in 1970 and in 1980, which in turn led to the fundamental transformation of Belgium into a federal country in 1993 (Ishiyama and Breuning, 1998). For Kris Deschouwer (2005, p. 51), Belgium's metamorphosis from a unitary state to a federal state was not the result

of a deliberate choice but of incremental conflict management ... Federalism just happens to be the system of government that emerged, to some extent

as the unwanted consequence of the search for a way to keep two increasingly divergent parts of the country together.

Conclusion

The choice of judicial and territorial institutions is a crucial decision for any developing political system. How executive and legislative power is checked is an important consideration in constitutional design. Judiciaries are held out as the best check against the political excesses of other branches of government, but there remains considerable debate over how independent and/or how active an unelected (and for some critics, an unaccountable) branch of government should be in shaping policies and laws. Others, as we have seen, have argued that only through an empowered judiciary can democracy be promoted and consolidated.

The territorial dispersion of power has also been held out as a way to protect regional and local interests, and provide representation to those whose interests might be trampled by a political majority, or politically dominant group. But how far should decentralization go? How should subnational units be organized? Should they be organized along ethnolinguistic lines or other identity markers (as in Ethiopia, and potentially Iraq)? Or should more congruent forms of federalism be adopted, especially to deal with the political problems associated with cultural pluralism? These are questions that every constitutional designer must face, in addition to the choice of electoral system and the structure of legislative-executive relations.

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